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DEC 10 2010

MEMORANDUM FOR SECRETARY OF THE NAVY

SUBJECT: Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (Report No. IPO2010E003)

This final report is provided for your review and comment. Your comments on the previous draft report were considered in finalizing the report and are included verbatim in the final report. Management comments on the recommendations are summarized and discussed in connection with individual recommendations.

You generally concurred with the draft and included technical/factual corrections and updates, which were incorporated. However, the final report reflects several continuing disagreements. We specifically request your comments on these disagreements. Please ensure we receive your comments on this final report within 30 days. Submit your comments electronically to [melvina.coakley@dodig.mil](mailto:melvina.coakley@dodig.mil).

We appreciate the courtesies extended to the review staff. For additional information or for any questions you may have, please contact me at (703) 604-8300 or have your staff contact Ms. Melvina Coakley, (703) 604-8622. You may also contact Mr. John Perryman, Director of Oversight, at (703) 604-8765.

A handwritten signature in black ink, reading "Gordon S. Heddell", is positioned above the printed name.

Gordon S. Heddell

cc:

Judge Advocate General of the Navy  
SJA to the Commandant, USMC



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# **Evaluation of Post-Trial Reviews of Courts-Martial Within the Department of the Navy (Report No. IPO2010E003)**

## **I. INTRODUCTION AND SUMMARY**

In its “Report on the National Defense Authorization Act for 2010,” the Senate Armed Services Committee directed the DoDIG to review the systems, policies and procedures for post-trial review of courts-martial in the Department of the Navy (DON) and to assess their adequacy (see Appendix A). We announced the review on November 4, 2009. After assembling a team with the required expertise, we began field work in February 2010, focusing on the following specific objectives:

- the history of Navy and Marine Corps problems and attempted corrections since 1990 to ensure the appellate review process for general and special courts-martial met legal standards;
- whether current systems, procedures and policies ensure timely and legally sufficient post-trial courts-martial reviews within the Navy and Marine Corps; and
- whether Navy and Marine Corps resources devoted to post-trial processes, information and tracking systems, procedures and policies, and monitoring/supervision are adequate to meet due process requirements under the Uniform Code of Military Justice and case law.

The post-trial process begins immediately after a court-martial concludes. The specific actions (type and number) entailed in the process are determined by whether the accused was convicted and, if so, the sentence imposed. Appendix B is a flow chart showing major legal steps in the post-trial process.

For this review, we focused on the most expansive post-trial processing and review requirements—those triggered when a special or general court-martial conviction results in 1 year or more in confinement, a punitive discharge, or death. In each such case:

- the trial counsel must ensure preparation of a verbatim record of trial, which the military judge authenticates;
- the accused, usually through defense counsel, may challenge the court-martial results and/or submit matters involving clemency;
- the staff judge advocate must review the case and prepare a recommendation for action by the convening authority (a commander empowered to convene a court-martial);
- the convening authority must take action approving, modifying, mitigating, or setting aside the findings and/or sentence;
- the staff judge advocate must prepare orders executing the convening authority’s action; and
- the entire record of trial and associated documents must be sent to the Navy-Marine Corps Appellate Review Activity (NAMARA) for review, first by Appellate Defense and Appellate Government counsel and then for judicial review and decision by the Navy-Marine Corps Court of Criminal Appeals (the Court).

To evaluate the post-trial process, we reviewed the governing policy and requirements, organizational structures and alignments, and pertinent guidance from organizations such as the American Bar Association (ABA). We also examined previous reports with findings and recommendations related to Navy appellate reviews. In addition, we met with officials responsible for appellate reviews in the Navy and Marine Corps, including the Judge Advocate General of the Navy (Navy JAG) and the Staff Judge Advocate to the Commandant of the Marine Corps (Marine Corps SJA). For comparative purposes, we also met with Army and Air Force officials involved in their appellate review processes, and collected and reviewed information from them. We also visited various Navy and Marine Corps operating sites to view systems and processes, and interview responsible personnel. In total, we interviewed 71 officials in the Navy, Marine Corps, and other Services.

We determined that Navy JAGs have not fully accomplished their post-trial military justice mission as required in statute and regulation. There have been consistent failures in leadership, supervision and oversight at all organizational levels, impacting military justice in both the Navy and Marine Corps. The failures resulted in inadequate institutional vigilance to ensure process health and, in many instances, failures to exercise the diligence and competence required of legal professionals. Serious post-trial processing problems persisted for at least the last two decades, and some old Navy and Marine Corps cases with lengthy post-trial processing delays still find their way into the appellate courts.

Process failures occurred at almost every segment in the post-trial process. They resulted from inadequate leadership, supervision and oversight over organizations suffering from many policy and structural deficiencies, including:

- ineffective Navy and Marine Corps tracking systems and absent, or unenforced, processing timelines;
- inadequate policy prescribing expectations and standardized processes, procedures and checklists for processing courts-martial;
- decentralized organizational structures wherein every legal office or staff judge advocate functions independently without higher headquarters oversight or professional supervision; and
- ineffective inspections, which either did not detect/identify post-trial problems, or did not lead to sufficient or lasting corrective actions.

Over the last 3-4 years, many significant improvements have been instituted, including initiatives not yet completed, or still in planning or development stages. However, unless addressed appropriately, issues remain that could preclude enduring reform. The principal issues are summarized below.

### ***A. Case Tracking and Management***

Automated tracking systems for appellate cases have a long and troubled history in the Navy. The current Case Management, Tracking and Information System (CMTIS) was fielded in October 2006, substantial modifications were completed in May 2010, and additional modifications are ongoing. And, the Marine Corps has a separate case tracking system, the Case Management System (CMS), which was not fielded until February 2010. Although these



systems represent progress in recent years, Navy and Marine Corps managers and supervisors still do not have the visibility they need from automated systems to monitor case progress and timeliness across the post-trial process. Two months after our initial data call, the Navy was still struggling to provide needed case processing information. In comparison, the Army and Air Force were able to provide case processing information on request.

Some in the Navy JAG organization believe the current CMTIS and Marine Corps CMS have the capabilities needed to oversee the post-trial process and prevent problems from recurring. The CMTIS, however, still has significant problems with missing data (individual cases) and “lost” cases—partial case records “rolled-up” into CMTIS in 2006 and still not accounted for, or cases never included in CMTIS. One cause for the missing cases may be premature records destruction, which we were told was a routine practice in at least one Marine Corps installation until approximately 2006.<sup>1</sup>

## ***B. Standards and Timelines***

Some post-trial processing problems resulted from nonexistent or inadequate process standardization, guidelines, checklists, and responsibility assignments across the Navy and Marine Corps. In any organization, especially one as large as the combined Navy and Marine Corps, defined and published processes and performance standards are needed to ensure organizations operate properly, consistently and timely, despite personnel turnovers and the varying experience/expertise of assigned personnel. Although some officials interviewed identified the Uniform Code of Military Justice and Manual for Courts-Martial as their process guides, these overall guides are not sufficiently detailed to assure consistently good or timely post-trial processes.

In the last 3-4 years, the current leadership team has been attacking problems in the military justice system, but without published, institutionalized standards and requirements for both field and headquarters mission areas, this area remains a concern. This year's annual review of military justice administration in the Navy offers an opportunity to address this issue in greater detail.

## ***C. Supervision and Oversight***

We found few oversight or supervisory mechanisms embodied in policy or institutionalized processes, and very limited oversight capability existed historically. Only the Navy JAG and the Commander, Naval Legal Service Command, who is also the Deputy Navy JAG, have supervisory authority over Navy field activities and they have limited their oversight capabilities. Prior to the CMTIS deployment in 2006, Navy field activity performance could not be monitored and totally depended on individual staff judge advocate experience. An organization without effective oversight capability cannot ensure subordinate activities perform to acceptable standards.

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<sup>1</sup> A Reserve judge advocate assigned to deal with delay problems after *Moreno* told us he visited the Office of the Staff Judge Advocate at Quantico, VA, and discovered they had routinely disposed of case records at the 5 year mark applicable to general administrative files, not unique military justice records. According to this source, although this practice had been discontinued when he visited the site, several earlier cases had been destroyed based on the erroneous application.

Similarly, prior to the Marine Corps CMS fielding in February 2010, there was no effective way to monitor Marine Corps field activities. Marine Corps field offices do not have higher headquarters supervisory legal authority except for the Navy JAG, who historically has not exercised supervision or oversight over Marine Corps organizations. The Marine Corps SJA is a headquarters-level staff function without supervisory authority over field legal functions, except as the Secretary of the Navy, Commandant of the Marine Corps, or Navy JAG confers.<sup>2</sup> We believe the Marine Corps SJA should be empowered to exercise professional supervision over Marine judge advocates.

The current Navy JAG established the Military Justice Oversight Council in 2009, creating the first high-level oversight mechanism for military justice we could identify in the Navy. This council, which includes both the Navy JAG and Marine Corps SJA, has been meeting monthly to address issues in military justice and review progress in significant cases. In addition, each week, the Deputy Commander, Naval Legal Service Command, now reviews all cases with convening authority action dates more than 75 days old to deal with issues and assess process timeliness. This weekly review, however, depends on ad-hoc reports, is labor intensive, is not required in policy, and has not ensured all old cases were located or addressed.

#### ***D. Inspections***

The Navy JAG has operated an inspection program for many years; however, the program did not prevent the problems leading to our review. In 2006-2007, the current Navy JAG (then the Commander, Naval Legal Service Command) substantially redesigned the existing military justice inspection system, which he believed had become ineffective. The new system envisioned better, more rigorous field performance assessments through Naval Legal Service Command case monitoring using CMTIS, field reports on high visibility litigation, surveys, and more limited inspections during field visits. However, due in large part to CMTIS shortcomings and not using subject matter experts to examine military justice administration in the field, the redesigned system did not deliver as expected. The Navy continued not to have the visibility over cases needed to manage the appellate process effectively. The current Navy JAG recognized the shortcomings and in June 2010, announced a new inspection program to require annual inspections, as well as subject matter experts on the inspection teams. He advised us about the changes in June 2010, when we met to describe our review findings.

Navy inspections have not included Marine Corps activities and prior to 2010, Marine Corps visits to field activities, which reportedly were conducted under the Commandant's inherent authority to manage the force, were designed to assess legal community "health" and address "command concerns," but were not thorough inspections based on inspection standards or checklists. In May 2010, the Marine Corps instituted a Commander-based inspection program for its Staff Judge Advocate Offices, Law Centers, and Legal Service Support Sections.

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<sup>2</sup> For example, under agreement between the Navy JAG and Commandant of the Marine Corps dating to 1999, the Marine Corps SJA has had some authority to conduct Article 6 visits/inspections at Marine Corps units, but apparently did not exercise the authority prior to 2010.

Without effective case monitoring as described above, coupled with inspections insufficient to identify problems in the field, the DON has not been in a position to ensure either effectiveness or timeliness in post-trial processes.<sup>3</sup>

### ***E. Chief Defense Counsel***

The Navy is the only Service without a Chief Defense Counsel, and does not have an office responsible for trial defense services Navy-wide. Consequently, no one organization or supervisory authority is developing policies or training programs tailored to the community's needs, or overseeing the competence, delivery, or efficiency of defense services in the field. Unique issues and challenges confronting the defense counsel community warrant this attention. Not having a functional head for defense counsel issues represents a significant leadership vacuum in defense practice.

### ***F. Improvements Noted***

According to the Navy JAG and other senior leaders we interviewed, the current leadership team is committed to fixing the problems in the Navy and Marine Corps. Before this review, they had completed many initiatives and had many others underway or planned. The leadership team, including the Assistant Judge Advocate General for Military Justice (Code 02) and individual leaders in NAMARA and the Court, are all qualified, motivated and committed to improving quality in military justice administration and litigation practice in the Navy and Marine Corps. They labored to improve operating practices, developing tracking and other mechanisms to gain visibility over cases they could not attain through the Navy's official case tracking system. Assisted by declining caseloads and staffing surges beginning in 2004, they eliminated an immense case backlog. Significant improvements contributing to this result included:

- In 2007, at Navy JAG request, the Secretary of the Navy created a new Chief Judge of the Navy position, which should improve quality and performance in both the Trial and Appellate Judiciary.

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<sup>3</sup> In commenting on the draft report, the Navy JAG disagreed with our overall assessment:

Navy post-trial processing has steadily improved as a result of delegating responsibility to . . . [Region Legal Service Office] Commanding Officers and holding them accountable to ensure post-trial processing compliance. Of cases tried after the *Moreno* case's effective date (10 June 2006), *no* Navy or Marine Corps case has required relief for unreasonable post-trial delay by either the . . . [Court] or the . . . [Court of Appeals for the Armed Forces]. That is a reflection of the improvement in timeliness at every segment of post-trial processing. The average time from sentencing to convening authority's action in FY07 (the first year for which CMTIS has complete data) was 93 days - already within the *Moreno* guidelines issued the year before. The average time for this segment of the post-trial process declined further by FY10 to 83 days. In fact, every year since *Moreno*, the average time from sentencing to convening authority's action has remained well below the 120 days permitted by the established guidelines. The average time from the convening authority's action to receipt for docketing has also fallen from a high of 69 days in FY 07 to 14 days in FY 10 -less than half of the *Moreno* guideline. Of those cases docketed after the *Moreno* case's effective date in 2006, only ten Navy or Marine Corps cases exceeded 18 months from docketing to decision by the NMCCA.

This level of specificity was not available from the Navy when we completed our field work. As discussed in this report, data inaccuracies and limitations in CMTIS prevented this type determination. In addition, neither CMTIS, the ad-hoc systems implemented to gain visibility over cases in the field, nor the quarterly "audits" conducted to identify lost/missing appellate cases prevented surprise when the *Bartolo* case surfaced during our review.

- In 2009, the Navy JAG established a new Judicial Screening Board process, which should enhance competence and credibility in judges assigned to the Court.
- In 2009, to help assure needed continuity and expertise, the Navy JAG civilianized the Deputy Director positions in the Appellate Defense and Appellate Government Divisions—the individuals in these positions will be critical in managing workload and staff, identifying caseload surge indicators, and securing resources and support to prevent backlogs from recurring.
- In 2009, the Navy published the first-ever policy for the Court [Judge Advocate General Instruction (JAGINST) 5814.1, “Navy-Marine Corps Court of Criminal Appeals,” August 3, 2009], and new “Rules of Practice and Procedure Including Internal Operating Procedures” (effective February 1, 2010), providing some much needed standardization.
- Following the “Report on the State of Navy Military Justice,” July 1, 2009 (the O’Toole report), the Navy JAG committed to reviewing annually the state of military justice in the Navy—these annual reviews should help improve effectiveness in both existing and new processes/programs, but the Marine Corps should be included in the reviews. Similarly, the recently-adopted Military Justice Oversight Council, which the Navy JAG chairs, is an important step in establishing the higher-headquarters supervisory review and oversight lacking historically.

Current staffing in the appellate divisions and Court appears sufficient to maintain timely processing, if current case levels continue. However, the appellate divisions and Court could not accomplish their day-to-day missions without substantial Reserve support. Assignment selection policies should be tailored to assure a well-qualified active duty complement, as well as a ready Reserve resource, for these divisions and the Court.

## **G. Recommendations**

Section VI. of this report includes our detailed recommendations to address these principal issues and others identified in the review.

Upon completing our review, we issued a draft report with 16 recommendations for improvement in DON post-trial processing. The DON concurred with 14 recommendations and concurred in part with 2 recommendations.<sup>4</sup> The comments on recommendations are described and addressed in Section VI. Section VII is the complete DON response to the draft report.

## **II. BACKGROUND**

### **A. Senate Armed Services Committee Concern**

In *Toohy v. United States*, 60 M.J. 100 (C.A.A.F. 2004), the U. S. Court of Appeals for the Armed Forces established standards for assessing whether convicted Service members had been denied due process under the Fifth Amendment to the Constitution as a result of being denied timely processing of their appellate cases. Since then, a succession of Navy and Marine Corps

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<sup>4</sup> In finalizing the report, we consolidated two recommendations into others to avoid overlap/redundancy.

cases have addressed extremely lengthy delays in appellate reviews.<sup>5</sup> In *United States v. Foster* (N.M.C.C.A. No. 200101955, February 17, 2009), a Marine's conviction for domestic rape was set aside because the conviction "could not withstand the test for legal and factual sufficiency." Foster had been confined for more than 9 years awaiting his automatic appellate review when his conviction was overturned.

According to the Senate Armed Services Committee:

*. . . These cases demonstrate that cognizant legal authorities in the Department of the Navy have not taken necessary and appropriate steps to ensure that the resources, command attention, and necessary supervision have been devoted to the task of ensuring that the Navy and Marine Corps post-trial military justice system functions properly in all cases. . . .*

## **B. Uniform Code of Military Justice**

The Uniform Code of Military Justice, 10 U.S.C. §§ 801-946, is the statutory foundation for the criminal justice system in the U.S. Armed Forces. The Uniform Code of Military Justice contains the non-judicial and judicial structures by which military members are disciplined for criminal misconduct. The punitive articles contained in §§ 877-934 (Articles 77 through 134) constitute the criminal code promulgated pursuant to the Congress' constitutional authority to make rules for regulating land and naval forces.

Courts-martial are the military forum for criminal trials and are conducted pursuant to provisions in the Uniform Code of Military Justice, as amplified in the Manual for Courts-Martial, promulgated by presidential Executive Order. As compared to civilian Federal courts, military courts have procedural differences to accommodate a highly-mobile military organization that must carry its code worldwide and function in austere and remote circumstances.

The military commander, who is the cornerstone of the military justice system, is responsible for building an effective, well-disciplined force and must possess authority to assure discipline. When a Service member commits a crime, a commander (one specifically designated as a convening authority) decides whether to convene a court-martial and send a person to trial (referral).

If the trial results in a conviction, the convening authority reviews the case and takes action on the findings and sentence. If the approved sentence includes death, dismissal of an officer, dishonorable discharge, bad-conduct discharge, or confinement for 1 year or more, the cognizant Service court of criminal appeals reviews the case.

In the Department of the Navy, the Navy-Marine Corps Court of Criminal Appeals fulfills this first-level appellate review function. Service courts of criminal appeals review cases for legal error, factual sufficiency, and sentence appropriateness. Senior military lawyers serve as judges

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<sup>5</sup> These cases include *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005); *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006); *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); and most recently, the unpublished *Foster* case.

on these appeals courts. Service Judge Advocates General review, for error, those cases involving less severe sentences arising from general court-martial convictions.

After a Service court of criminal appeals review, a convicted Service member may petition the U.S. Court of Appeals for the Armed Forces for further review. Unless the sentence extends to death, the Court of Appeals for the Armed Forces has discretion to grant or deny the additional appellate review. Review is required in a death case.

Five civilian judges, without fact-finding authority, comprise the U.S. Court of Appeals for the Armed Forces. If unsuccessful in the military courts, the convicted Service member may petition the U.S. Supreme Court to review the conviction. U.S. Supreme Court reviews are rare.

A convicted Service member is entitled by law to receive legal assistance and representation from a military appellate defense counsel, without cost, before a Service court of criminal appeals, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court. The Service member may also retain a civilian attorney, at personal expense.

### **C. Military Justice Organization**

Under Secretary of the Navy Instruction (SECNAVINST) 5430.27C, “Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services,” April 17, 2009, the Navy JAG:

*. . . is responsible for providing and supervising the provision of legal advice and related services throughout the Department of the Navy in the following areas:*

- a. Military Justice. The JAG is responsible for the military justice function within the Department of the Navy. The military justice function includes, but is not limited to, the implementation, execution, management, and oversight of the military criminal justice system at the trial and appellate levels. In performing this function, the JAG has primary responsibility for military justice matters within the Navy, including: inspecting Naval Legal Service Command legal offices; certifying military judges for practice on the bench; certifying trial and defense counsel for practice in military courts-martial; taking action in certain courts-martial if the convening authority fails to do so; receiving records of trial from military courts-martial; establishing and staffing the Navy and Marine Corps Court of Criminal Appeals; and ordering review of certain cases by the Court of Appeals for the Armed Forces. . .*

The Navy JAG and Marine Corps organizational structures are shown in Appendix C. Their field and appellate-level organizations involved in military justice are described in Appendix D.

### III. **SCOPE**

To assist us in evaluating the post-trial processes, systems and procedures (past and present) for courts-martial in the DON, we retained the services (temporary appointment) of a retired Brigadier General from the Air Force Judge Advocate General Corps who had served as a defense counsel, government counsel, and judge advocate at all organizational and command levels. We then reviewed the governing DoD and Service policy and other guidance documents, organizational structures and alignments, and other pertinent requirements or guidance from organizations such as the ABA. We also reviewed previous reports with findings and recommendations related to Navy and Marine Corps appellate reviews.

We met with the Navy JAG, Marine Corps SJA, their senior staffs, and various other Navy and Marine Corps officials involved in appellate reviews in the DON. For comparative purposes, we also met with Army and Air Force officials involved in their appellate reviews, and collected and reviewed information from them.

In addition, we visited various Navy and Marine Corps operating sites, including division heads and staffs at the Washington Navy Yard, the Pentagon, the Navy Region Legal Service Offices in Norfolk, Virginia, and San Diego, California, the Marine Corps Joint Law Center at Quantico, Virginia, and Marine Corps Legal Services Support Sections at Camp LeJeune, North Carolina, and Camp Pendleton, California. In total, we interviewed 71 officials in the Navy, Marine Corps, and other Services.

### IV. **FINDINGS AND ANALYSIS**

#### **A. *Summary of Problems and Attempted Corrections***

Serious post-trial processing problems have persisted in the Navy and Marine Corps for at least two decades. Some old post-trial delay cases still find their way to the appellate court. Although the current data are inadequate to determine the extent to which old cases will continue arriving at the Court, the data indicate a continuation is likely.

##### **1. Standards**

###### **a. U. S. Constitution**

The 5th Amendment to the Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." The U.S. Court of Appeals for the Armed Forces has interpreted this provision as extending to post-trial processing delays in courts-martial.

###### **b. Courts-Martial**

The Uniform Code of Military Justice (10 U.S.C. § 801 *et seq.*) and its promulgating Executive Order, the Manual for Courts-Martial, set forth the requirements and procedures for post-trial processing. These documents prescribe few specific timelines for post-trial processing, and those prescribed generally address defense counsel's duty to respond. There are occasional, non-directive exhortations in discussion sections to act "promptly" (e.g., provide written notice of findings and sentence, R.C.M. 502 (d)(5) in *Discussion (F)*), but there is no specified entitlement



to speedy post-trial processing. However, the U.S. Court of Appeals for the Armed Forces (formerly the U.S. Court of Military Appeals) has interpreted Articles 66 and 70, Uniform Code of Military Justice, as affording appellants a right to timely review and to defense counsel able to represent them in both a competent and timely manner before the court of criminal appeals (see *Diaz*, *infra*).

### **c. Professional Responsibility**

Each state bar association publishes rules of professional responsibility governing the professional conduct of all attorneys licensed by the state. Failure to adhere to these rules can result in suspension or disbarment from practicing law in the state.

Over the years, the ABA has developed and published model Codes or Rules for Professional Responsibility. These rules assist state licensing authorities in formulating their rules of practice. There is also an ABA Model Code of Judicial Conduct pertaining specifically to judicial activity, which has been widely adopted.

Additionally, each Military Department has regulations detailing rules of professional responsibility to govern the practice of law by all uniformed and civilian attorneys working within the judge advocate corps or department. Furthermore, for military judges, the Army and Air Force have Service-specific Codes of Judicial conduct. The DON does not have a department-specific code, but has adopted the ABA's Code of Judicial Conduct for the Court.

A Service attorney is governed by the rules of the state of licensure and the employing military Service. Although there are periodic changes in these rules, for periods assessed in this review, they have always imposed a duty on counsel to act diligently to promote fair and efficient administration of justice. A list of important professional responsibility requirements relevant to this review are summarized in Appendix F.

### **d. Case Law**

Many standards pertinent to administering military justice emanate from military and U.S. Supreme Court decisions. These decisions are binding on the Services, which are required to comply. Three important decisions are summarized below:

(1) ***Dunlap v. Convening Authority***, 48 C.M.R. 751 (1974) (Army case): The then U.S. Court of Military Appeals tackled the problem of post-trial delay by imposing a rule presuming a denial of speedy disposition when an accused was continuously confined after trial and the convening authority did not promulgate final action within 90 days. Failure to comply with this standard resulted in automatic dismissal of charges unless the Government could demonstrate diligence.

The court noted delays in convening authority actions had been the subject of critical court comments for a number of years. The court stated "Congress has commanded timeliness of proceedings not only for the pretrial stages of the courts-martial processes and the trial, but also in the appellate process. . . . Years of experience have demonstrated the need for a guideline as to the timeliness of the convening authority's action when the accused is continued or placed in arrest or confinement after conviction by the court-martial."

This 90 day rule became the established standard until its 1979 rescission in *U.S. v. Banks*, 7 M.J. 92 (C.M.A. 1979). In *Banks*, the Court reiterated the importance of timeliness in post-trial review, but concluded process improvements had eliminated the need for the inflexible 90 day rule imposed in *Dunlap*.

(2) *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003) (Navy case): The U.S. Court of Appeals for the Armed Forces determined that an accused has a 5th Amendment due process right and an Article 66, Uniform Code of Military Justice, right to timely review of the findings and sentence at all stages of the proceeding. Furthermore, the Government has a statutory obligation under Article 70, Uniform Code of Military Justice, to provide appellants with counsel who can represent them in both a competent and timely manner.

(3) *U.S. v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) (Marine Corps case): A host of military appellate court decisions in the last several decades addressed post-trial processing delay problems. Although all the Services had cases with unacceptably long delays, the Navy and Marine Corps experienced consistently more difficulty in correcting the systemic practices causing the delays. Consequently, in 2006, the U.S. Court of Appeals for the Armed Forces established standards for measuring post-trial processing delays to determine whether a delay was unreasonable and whether the appellant was prejudiced thereby.

In *Moreno*, the Court, frustrated by years of unheeded warnings, declared it would "apply a presumption of unreasonable delay" whenever:

- the action of the convening authority is not taken within 120 days of the completion of trial;
- the record of trial is not docketed by the Service Court of Criminal Appeals within 30 days of the convening authority's action; or
- appellate review is not completed and a decision is not rendered within 18 months of docketing the case before the court of criminal appeals.

In announcing its decision, the U.S. Court of Appeals for the Armed Forces was clear that administrative, manpower and workload factors were not acceptable factors excusing delay and did not "trump the Article 66 and due process rights of appellants." The U.S. Court of Appeals for the Armed Forces was also clear it expected convening authorities, reviewing authorities, and courts of criminal appeal to document the reasons for delay and exercise the institutional vigilance absent in *Moreno*.

These *Moreno* timelines are the primary standards the Navy and Marine Corps currently use to measure timeliness in post-trial processing.

#### **e. Policy**

Relevant policy and requirements are listed in Appendix G.

## 2. Facts

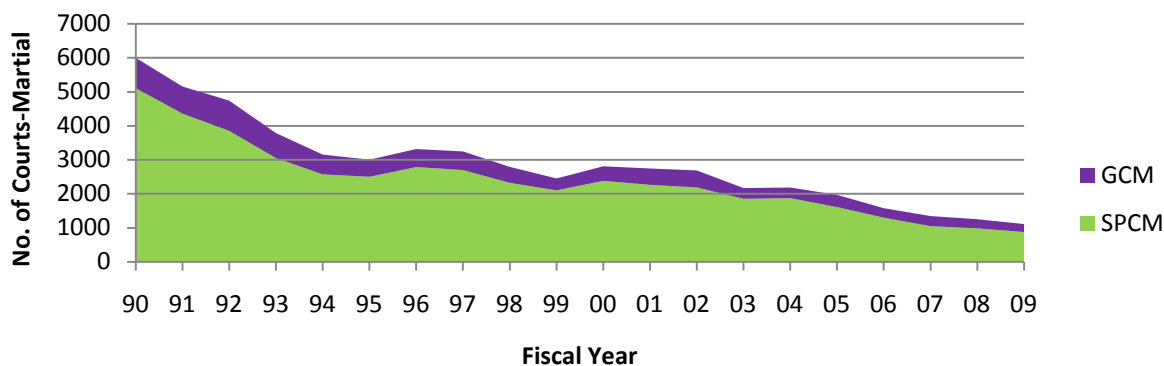
There is no reliable database or reporting system to identify or assess either the nature or extent of the DON's post-trial processing problems, either historically or currently. Information from automated systems pre-dating the 2006 CMTIS was generally unavailable or unreliable, and many data points could not be provided for our review. Additionally, the Navy used several different systems since 1980, and the Navy and Marine Corps continue to use different systems. The Marine Corps system did not provide any headquarters-level visibility until late 2009, and information was not reliable until the modified CMS was fielded in February 2010.

Article 146, Uniform Code of Military Justice, establishes a committee to meet annually and survey Uniform Code of Military Justice operations. The Committee is composed of judges from the U.S. Court of Appeals for the Armed Forces, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Marine Corps SJA, and two members of the public, which the Secretary of Defense appoints. The resulting Annual Reports of the Code Committee on Military Justice are published and are available on the web. The military justice data in these reports is the most complete, reliable information on historical performance available for the Navy and Marine Corps.

Appendix H is based on these annual reports and shows the numbers of courts-martial within the DoD, by Service and in total, for Fiscal Years 1990 through 2009 (the past 20 fiscal years). Appendix H also shows the numbers of records of trial that the Service courts of appeal received, by Service and in total, and the cases they reviewed, by Service and in total, during the 20 years.

As can be seen in Appendix H, over the 20 years, the Navy and Marine Corps accounted for over 61 percent of the total DoD courts-martial, and over 56 percent of the total DoD appellate cases reviewed. Over the 20 years, the Navy and Marine Corps also accounted for over 56 percent of the total general and special courts-martial conducted in the DoD. The graph below shows the trend in general and special courts-martial in the Navy and Marine Corps.

### Navy and Marine Corps General and Special Courts-Martial FY 1990 - FY 2009



As can be seen above, the number of general and special courts-martial declined significantly, from 5,999 in FY 1990 to 1,112 in FY 2009. The decline was relatively steady over the years, although there were slight “bubble” increases in FYs 1996-1997, FYs 2000-2002, and FY 2004.

The general and special courts-martial involved in our review were those resulting in convictions in which the accused was sentenced to a year or more in confinement, a punitive discharge, or death. In these cases, the appeal process was supposed to have occurred automatically, unless the accused waived the appeal right (not permitted in a death case). The appeal process is shown in Appendix B.

To help assess historic and current post-trial practices, we researched case law dating to the 1970s and extracted cases illustrating the range and nature of the post-trial processing problems. See Appendix I. In addition, at our request, the Appellate Government Division (Code 46) searched the Lexis legal database, identifying 53 cases from the Court of Appeals for the Armed Forces and 195 cases from the Navy-Marine Corps Court of Criminal Appeals, all involving post-trial delay issues completed in the courts since 1990. Finally, an Office of the Judge Advocate General briefing slide from 2006 identified 19 cases decided in the 6 weeks December 1, 2005, through January 17, 2006, all with post-trial delays the Court found unreasonable.

One previous report was particularly helpful in examining the post-trial processing delay history. On May 4, 2009, in the wake of *Foster*,<sup>6</sup> the Navy JAG, then Vice Admiral Bruce MacDonald, directed Captain Daniel O'Toole and a panel of experts to examine the state of military justice in the U.S. Navy. In the resulting “Report on the State of Military Justice,” July 1, 2009 (O'Toole report), Captain O'Toole concluded a series of events led to an environment in which a case like *Foster* was permitted to happen, and the Navy Judge Advocate General Corps needed to re-focus on its statutory military justice mission. The Navy JAG approved Captain O'Toole's findings and recommendations, and the newly-nominated Marine Corps SJA concurred.<sup>7</sup> Relevant discussion and findings from the O'Toole report are referenced, summarized, or quoted throughout this report. Recommendations from the report are listed in Appendix J.

The history of problems and attempted corrections are described in Appendix K.

### **3. Discussion**

Many factors contributed to the persistent post-trial delay problems in the Navy and Marine Corps over the past two decades. Military justice lost focus as the core judge advocate mission area, and process failures occurred at every segment in the post-trial process. Despite multiple warnings and opportunities for reform, post-trial processing issues did not command sufficient senior leadership attention or interest. In 2006, frustrated by years of inaction in addressing the problems, the U.S. Court of Appeals for the Armed Forces established strict processing timelines in the *Moreno* case in an effort to take control of a situation the Navy and Marine Corps would not address. Over the years, the appellate courts repeatedly addressed inadequate “institutional

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<sup>6</sup> Approximately 10 years from sentence to final appellate decision.

<sup>7</sup> The charter for the review did not include Marine Corps operations. According to Captain O'Toole, his review was only one part of the multi-review process initiated after *Foster* to assess Navy and Marine Corps processes and accountability.

vigilance" and inadequate "professional diligence" demonstrated in multiple delay cases presented for court review.

Longstanding process failures stemmed from inadequate leadership, supervision and oversight in organizations suffering from many policy and structural impediments, including:

- ineffective tracking systems and absent or unenforced processing timelines;
- inadequate Service-wide policy prescribing Service expectations and standardizing processes, procedures and checklists for processing courts-martial;
- an almost unmanageable number of Navy convening authorities (every ship commanding officer is a convening authority), as contrasted to other Services where the number is far more constrained; and
- very decentralized organizational structures wherein every legal office or staff judge advocate functions independently without higher headquarters oversight or professional supervision.

Through statute and Secretary of the Navy Instruction the Navy JAG is responsible for administering military justice in both the Navy and Marine Corps. Historically, however, the Navy JAG appears to have exercised little oversight over Marine Corps practices or problems. In addition, prior to the *Foster* case, the Navy JAG did little to address post-trial delay problems in either the Navy or Marine Corps.

Our review focused on problems and attempted corrections over the past 20 years. Although Article 6 inspections<sup>8</sup> were conducted, the inspections were not rigorous or sufficiently thorough to highlight the significant process problems pervasive in both Navy and Marine Corps field units.<sup>9</sup> In 2006, the *Moreno* case triggered significant and well-intentioned efforts to address longstanding process problems and case tracking. However, Navy's reliance on its case tracking system (CMTIS - fielded in October 2006), its decision to undertake nonprocess-oriented field inspections, and the Marine Corps' lack of any substantive inspection system prior to May 2010, contributed to the overall difficulties in identifying and remedying post-trial process and delay problems.

Our review revealed lengthy delays and inadequate process/tracking at every major action point, including:

- preparing staff judge advocate reviews and convening authority actions;
- distributing records of trial to NAMARA;
- receiving and processing records of trial at NAMARA and the Court;

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<sup>8</sup> Section 806, Article 6(a), Uniform Code of Military Justice, provides “. . . [t]he Judge Advocate General or senior members of his staff shall make frequent inspection in the field in supervision of the administration of military justice. . . .” These inspections are generally referred to as Article 6 inspections.

<sup>9</sup> The Navy JAG did not typically conduct Article 6 inspections at Marine Corps units, instead deferring the responsibility to the Marine Corps SJA. On June 14, 2010, the Navy JAG published JAGINST 5040.1, “Uniform Code of Military Justice Article 6 Legal Office Assessments.” The previous draft version was the template for inspections from about 2007 until the final publication.

- delays and excessive time extensions in the Appellate Defense Division (Code 45);<sup>10</sup>
- and
- productivity and workload management issues in the Court.

When case backlogs began in the late 1990s, and again in the early to mid-2000s, staffing issues aggravated the backlogs. Staff increases for the Court and the Appellate Defense Division (Code 45) were not sufficient or timely to address the growing backlogs. Requests for increased staffing went unheeded until the case backlogs reached crisis stage.

Tracking/monitoring systems were ineffective in affording sufficient visibility over “choke points,” and the various divisions could not anticipate the growing caseload. Additionally, although responsible for cases after docketing, the Court did not take effective action to address the growing delay and backlog problems. Instead, the Court effectively surrendered its case management authority to an ever-increasing number of time extensions.

Overall, the Navy JAG and senior leadership did not satisfactorily identify, address, or fix the severe post-trial processing problems that recurred over two decades despite many warnings and trouble signs. When curative measures were taken, they were often short-lived or insufficiently institutionalized to endure past the incumbency of individuals who resolved problems at the time.

Prior to fielding CMTIS in October 2006, the Navy did not have an overall system capability to track courts-martial from the field to the Court. The focus seemed to be on “today,” with little attention to reviewing trends or conducting analyses to alleviate long-term problems or prevent future problems, except when particular issues surfaced requiring resolution. NAMARA and the courts were unable to anticipate workload and locate the many old, missing and unaccounted cases.

Individual court decisions in 1984, 1994, and 1997, specifically mentioned the Navy was working on effective tracking systems. The decision in a 1997 case included specific assurances the tracking problems had been fixed. However, the many piecemeal Navy systems employed since the 1980s were inadequate for effective oversight or case management.

When the Navy CMTIS was deployed in October 2006, data from previous systems were brought into CMTIS as partial records. Some data may have been lost or corrupted in the transition. As a result, CMTIS case information has never been complete and accurate.

In addition, different organizational elements have different permission/access rights to the system, which limits ability to correct data, or input missing data upon discovery. Equally important, individual attorneys/legal personnel responsible for case actions do not use CMTIS in completing their work. Instead, support staff members generally complete after-the-fact data entries in CMTIS. The attorneys and other legal personnel responsible for case actions tend to view the system as additional work, not an aid to completing cases or monitoring case actions.

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<sup>10</sup> Military justice practitioners generally use the term “enlargement” when referring to a time extension.

A primary objective in designing CMTIS was to capture workload types and hours for manpower and resource purposes. This design provided a system capability similar to one a private law firm might use for billing purposes, but not one well suited to capturing, querying, and reporting the extensive data required to manage the many actions involved in the overall court-martial process. In every Navy field and appellate organization we visited, an internally-developed mechanism, such as a spreadsheet to track individual cases and actions, was the tool of choice.

Field units might check CMTIS in reporting on individual cases, but the system was generally viewed as cumbersome, unwieldy, and unreliable. Individual users cannot generate ad-hoc queries or reports, and any request for system change or ad-hoc query/report must be pursued formally and may not even produce an answer.

The division responsible for CMTIS was repeatedly criticized for being unresponsive and unhelpful. Based on our review, the Knowledge and Information Services Division (Code 65) has neither the staffing nor expertise needed to handle the many system challenges and respond timely to the many headquarters and field support requests.

The Navy and Marine Corps continue struggling to overcome technology and automated system deficiencies. While visibility over courts-martial cases has improved, needed and more comprehensive capability remains elusive in many respects.

As late as May 2010, CMTIS did not afford anyone in NAMARA the capability to monitor or have visibility over cases in the field. As a result, NAMARA did not know when to expect a record of trial from the field, or whether it had received cases due from the field, compounding the “lost case” problem. This issue is not a CMTIS issue alone and, instead, reflects in part a philosophical difference regarding field and headquarters responsibilities and authorities. We were told, in fact, that NAMARA’s responsibilities did not begin until it received a record of trial and, therefore, NAMARA did not need visibility over cases pending in the field. Hence, NAMARA personnel were not authorized access to the CMTIS report module that would have allowed them to anticipate record of trial receipts.

Although recognizing the CMTIS data were incomplete and not fully reliable, NAMARA continuously requested system access or information to assist in accomplishing its mission, but the access requests were denied and the information received was not particularly helpful. Based on the significant post-trial delay and process problems persisting for much of the past 20 years, the decision to withhold useful information is inexplicable and cannot be justified. (Following a meeting with the Navy JAG in which we described our findings, we were told the appropriate officials in NAMARA now have system access, can correct erroneous data entries and input missing data, and soon will have capability to enter a new case in the system. Had NAMARA been given this authority when CMTIS was fielded, many current post-trial delay problems might have been avoided.)

The recently-fielded Marine Corps CMS appears to have substantially greater potential than the Navy CMTIS. Specifically, CMS appears to offer better and more complete capability for management to maintain visibility over individual case processing and status in the field, including post-trial processing in the field. However, CMS is still new, relatively untested and



has yet to develop all the needed capabilities. Additional time and study are necessary to judge the actual potential and determine whether CMS could be adopted for the Navy and Marine Corps overall.

After the *Moreno* decision in 2006, senior Navy and Marine Corps leadership began addressing more aggressively the problems plaguing their administration of military justice. Some resulting measures were detailed above. Others will be detailed subsequently in this report. Although many good changes were completed, initiated, or planned, they generally have not been institutionalized in policy, or other formal guidance. Additionally, several outdated policy documents require revision and reissuance.

A refrain heard repeatedly during interviews with the Navy JAG, Marine Corps SJA, and others was the deterioration in military justice administration resulted primarily from a culture of inattention and lost focus caused, in part, by the increasing need for operations law expertise in the years after the first Gulf War. Over time, military justice was not prized as much as operations law, which became the legal career path of choice, rewarded with promotions and fast-track assignments.

The autonomy accorded to highly-decentralized organizations in the Navy and Marine Corps led to very individualized processes and procedures, with little standardization. Many commanding officers had limited immediate legal support, and no one in the Judge Advocate General Corps or servicing legal organizations monitored events post-trial. The focus was on getting to trial; post-trial requirements were not important, and the typical first-assignment judge advocate had relatively little knowledge or understanding about post-trial processes.

Many remarked that no one came to the Judge Advocate General's Corps to be a “review officer,” and judge advocates avoided the duty if at all possible. These factors led to a decline in both experience and grade levels for personnel assigned to justice duties. Justice was often left to the most junior and most inexperienced judge advocates. One individual told us he witnessed the assignment in which the staff judge advocate position at Pensacola Naval Air Station was reduced in grade from an O-5 (commander) to an O-2 (lieutenant junior grade).

Nearly constant war demands and deployments left many sections understaffed. As a Center for Naval Analyses study pointed out, the Navy Judge Advocate General Corps was “undermanned” for the challenges and workload faced in recent years.<sup>11</sup> Likewise, the Marine Corps judge advocate force experienced a temporary reduction in authorized strength while incurring increased work requirements and demands for new positions.<sup>12</sup> The military justice workload has been declining, but the trend is not guaranteed.

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<sup>11</sup> CRM D0017961.A2/Final, “Levels of Service Options for the JAG Corps: Personnel-Mission Tradeoffs,” May 2008

<sup>12</sup> In commenting on the draft report, the Marine Corps provided the following clarification:

The Judge Advocate Authorized Strength Report (ASR . . . ) dropped in February 2008, as the Marine Corps was building its end strength to 202,000. The ASR increased again in August 2008 and has remained relatively stable since. The ASR (run twice annually) is the list of billets that is actually “purchased” by the Marine Corps given fiscal realities and funding priorities. Relevant ASR data is as follows:

i. August 2007: 311  
ii. February 2008: 294

We note the many dedicated people who, despite the many problems, worked hard every day in Navy and Marine Corps legal justice organizations to deliver good work products. Their dedication continued even though they may have been handicapped with understaffing, deployments, imperfect processes, minimal supervision, field leaders with limited experience in military justice matters, and systems affording little visibility over courts-martial cases, especially in the post-trial phase. Some organizational units labored in isolation from other units involved in the same court-martial, within an overall context in which the Navy and Marine Corps had the largest court-martial caseload of any Military Department.

***B. Do current systems, policies and procedures ensure timely and legally sufficient post-trial courts-martial reviews in the Navy and Marine Corps, and are resources sufficient?***

**1. Standards**

Relevant policy and requirements are listed in Appendix G.

**2. Facts**

In commencing this review, we met with Vice Admiral James Houck, Navy JAG, and then Colonel Vaughn Ary, Deputy Staff Judge Advocate and Acting Marine Corps SJA (later confirmed in the position) and several senior members of their staffs. They described the post-trial problems and outlined their ongoing initiatives to address the problems. Both agreed the post-trial delays, and the systemic failures they represented, had become a serious problem requiring aggressive and enduring corrective action.

**a. Ongoing Reviews and Initiatives**

(1) **Military Justice Review.** On May 4, 2009, in the wake of *U.S. v. Foster*, then Navy JAG, Vice Admiral Bruce MacDonald, directed a review of military justice actions, policies and procedures to ensure the Navy Judge Advocate General Corps performed its military justice functions in a competent, professional manner. He specified the need to institutionalize the policies and changes required to assure professional and timely military justice administration.

Captain Daniel O'Toole and five senior Navy and Marine Corps judge advocates authored the resulting O'Toole report. This comprehensive report identified many weakness in the pre-trial, trial, post-trial and appellate phases, outlined the lessons learned, and included recommendations for improvement, several of which we adopted. This report served as the stimulus for a series of additional initiatives to improve upon changes already implemented.

One such initiative required an annual review of military justice and progress in improving the identified weakness areas. Captain O'Toole will lead the review again this year—the report was due November 30, 2010.

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iii. August 2008: 330  
iv. February 2009: 367

(2) **Navy JAG Corps 2020 Strategic Plan.** The plan, prepared in 2006, outlines four core capabilities and transformation focus areas, including “Accountability.” Military justice is the key component in this capability, and the vision is to restore and strengthen the Judge Advocate General Corps’ competence in this core area. The focus is on developing a career track for judge advocates to specialize in military justice, improving litigation quality in the courtroom, appellate level, and senior leadership positions. The plan also commits to developing key performance measures to, among other things, measure timeliness and ensure services are relevant. The plan is based on capturing military justice data in CMTIS.

The Navy and Marine Corps have other initiatives, either completed, being implemented, or in planning. Other significant initiatives are discussed or referenced in this report. Appendix L details the complete list.

### **b. Navy Field Organization**

In 2006, the Navy realigned its field legal services offices within the Commander, Navy Installation Command Navy Region construct, creating Region Legal Service Offices (RLSOs). Consistent with consolidating assets in functional areas, the RLSOs acquired both the work and supervisory responsibilities for all installation staff judge advocates in the region. The formerly independent staff judge advocates were incorporated in and supervised by the RLSOs, and supported by the RLSO chain-of-command. Afloat legal staffs remained independent, but the RLSOs began supporting them administratively, as needed.

We visited the Mid-Atlantic RLSO, Norfolk, Naval Air Station, Virginia, and the Southwest RLSO, San Diego Metro, San Diego, California, to examine how they processed court-martial cases. The visits confirmed the concerns regarding processes and standards highlighted elsewhere in this report. See Appendices J and L.

Despite regionalizing legal services in 2006, the manner in which military justice is administered is not uniform across the RLSOs. As illustrated in the O’Toole report and confirmed in our review, there are significant variances in how individual offices do business and who “owns” specific processes. They lack standardization in both process responsibility and operating procedures. For example, depending on the RLSO involved, responsibility for post-trial case tracking may reside with the court reporter section, the staff judge advocate office, or the trial department. The responsibility may also be split between the trial department and the staff judge advocate office, with the trial department handling matters through record of trial authentication and the staff judge advocate’s office assuming responsibility following the authentication. See Appendix M.

The inconsistent operating procedures and responsibilities amplify opportunities for error, inconsistent case results, and inadequate processes. Personnel turnover occurs frequently and processes change or get lost as less experienced military justice administrators assume court-martial duties.

Good, effective processes come from practice and experience that produce “lessons learned.” These lessons learned are used to develop “best practices” from which uniform, tested performance standards and checklists are developed, resulting in standard processes and

procedures taught in a uniform, consistent manner in training, both formally and on-the-job. Periodic inspections then check actual performance to identify errors and opportunities for improvement.

We are not suggesting there is no room for innovation, creativity, or customization. We are suggesting the historic and current ad-hoc, trial-and-error method has not been effective.

**Processes/procedures:** The RLSOs developed individual, internal management processes and tracking mechanisms for their court-martial processes, including post-trial processes. Other than CMTIS, there is no standard system or mechanism to track a court-martial or actions on a court-martial. The RLSOs might use CMTIS on occasion to see if NAMARA received a particular record of trial, but generally do not use CMTIS in processing or tracking cases.<sup>13</sup>

The Navy JAG also does not have a Navy-wide standard operating procedure for managing or supervising military justice matters. There is some general direction in policy (Judge Advocate General Manual, and Judge Advocate General Instructions) dealing with military justice, but none provides for standard post-trial processing or tracking practices in the field. Other than the timelines for specific actions specified in *Moreno*, Navy JAG headquarters elements, including the Naval Legal Service Command, have not set timeliness goals and do not track the time required to complete individual actions or processes in a court-martial, including during post-trial processes.

In 2008, the Navy rescinded OPNAVINST 5810.4/JAGINST 5810.1, “Management Goals for Processing Navy Courts-Martial,” September 5, 1984. This instruction prescribed time guidelines for processing a court-martial, from first knowledge about an offense until final appellate review completion. The only remaining processing time goal is the *Moreno* timelines, which the Naval Legal Service Command and Navy JAG now attempt to monitor closely.

JAG/CNLSCINST 5814.1, “Post-Trial Checklists,” December 2, 1992, includes detailed checklists for determining progress in all court-martial phases. According to the JAG IG, however, the checklists have not been used for years and the instruction is undergoing revision.

Prior to June 2010, JAG IG inspections had become one-person checks that did not examine processes, case files, case management, or timeliness. The JAG IG spoke with command officials to assess relationships, but no longer completed comprehensive examinations. The inspections focused on leadership. Information on processing timeliness was not shared with the JAG IG before or during a field inspection.

The philosophy became that *Moreno* timeline monitoring at the Naval Legal Service Command made detailed JAG IG inspections unnecessary. However, CMTIS did not have the capability to give needed visibility over case processing or timeliness. Even if CMTIS had the capability, inspections to examine details of how individual field organizations function remained essential

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<sup>13</sup> In our final meeting with the Navy JAG before preparing this report, we were told the May 2010 CMTIS modifications incorporated all the data fields the RLSOs agreed were necessary for their needs, and the RLSOs now use CMTIS. We were also told the RLSOs will be instructed in the next 2-3 months to discontinue using their ad-hoc tracking systems and rely on CMTIS.

as a check on actual policy implementation and execution. Following a meeting with the Navy JAG in which we described our findings, we were told the Navy JAG had already decided to revise the inspection program to inject more technical evaluations.

According to the RLSOs we visited, afloat legal officers/staffs are not required to coordinate minor legal matters with a RLSO; however, if a Service member is court-martialed, the responsible command processes the court-martial through the supporting RLSO. How the cases and records of trial are tracked, and by which RLSO, are decided based on coordination between RLSOs and the command legal staff. (See Appendix K)

**Experience base:** The regional office structure, through resource consolidation, enables greater efficiency in military justice services and has potential to enhance consistency in legal advice, because the structure falls under senior, regional staff judge advocate direction and supervision. However, the structure does not necessarily assure a correct staff judge advocate review or pre-trial advice in a given case.

Commanding officers and executive officers in the RLSOs and Navy Legal Service Offices traditionally were selected for their leadership skills and potential, not their military justice experience. Because operational law became the practice of choice, military justice experience levels for more senior judge advocates on staff in these offices declined.

Most attorney positions in the justice divisions are filled with generally inexperienced, first-tour lieutenants. Consequently, having senior, experienced counsel in supervisory positions is essential to controlling quality and timeliness in military justice services.

Several interviewees told us the post-trial review sections at the RLSOs are the least desirable justice positions and lack command interest. Further, the review sections are often used more heavily to fill deployment requirements. These factors all contribute to the continuing time delay and quality problems in post-trial processing.

Another factor adversely impacting military justice competence is operational deployments, both frequency and number. These requirements are filled to a large degree from RLSO and Navy Legal Service Office assets, reducing the staff available to accomplish the work and effectively reducing tour lengths for new judge advocates. Rather than the 24-36 month standard tour to learn military justice fundamentals and develop litigation skills, lieutenants now spend only 18-24 months in first tours at a RLSO, and the tour may be as short as 6-12 months.

The Military Justice Litigation Career Track (MJLCT) was recently developed to address the declining experience base in litigation and military justice practice. This initiative includes using specialty positions for supervisory counsel and commanding officer/executive officer positions in RLSOs and Navy Legal Service Offices. The objective is to enhance both quality and performance in field military justice administration.

**Tracking systems:** RLSOs have a segmented internal organizational structure, which divides case management among different specialized departments (see Appendices K and M). The segmentation complicates court-martial monitoring and administration, particularly since no one office is monitoring overall case processing and/or there is no single tracking mechanism.

Both RLSOs we visited use internally-developed case tracking mechanisms to monitor case progression. Although they enter required data in CMTIS, they do not use CMTIS to generate reports for local use or case tracking. CMTIS does not capture some data they need/want for case monitoring.

We compared the tracking mechanisms used in the two RLSOs we visited. The RLSOs used similar data points to monitor compliance with *Moreno* timelines and track their post-trial activities, but their tracking mechanisms were different (see Appendix M).

**Command involvement/knowledge about military justice administration:** Commanders are responsible for administering military justice, and it is important for them to remain informed about individual cases and in a position to gauge overall system performance. The Naval Justice School has a week-long course to train senior officers in military justice matters. Prospective O-5 (commander) and O-6 (captain) commanding officers and executive officers are encouraged to attend this course enroute to becoming commanding officers and executive officers, and many do. Prospective commanding officers also receive some military justice training at the Prospective Commanding Officer Course at the Command Leadership School in Newport, RI.

### **c. Marine Corps Field Organization**

The Marine Corps has used the same organizational model for providing military justice legal services since the late 1960s. Legal Service Support Sections and Law Centers are the two primary organizational structures used. These organizations are typically divided into trial, court reporter, and review shops.

We visited the two Marine Corps Legal Service Support Sections at Camp LeJeune, NC, and Camp Pendleton, CA. We also visited the Joint Law Center at Marine Corps Base Quantico, Quantico, VA.

Like the Navy, the Marine Corps' decentralized operational structure does not easily lend itself to centralized oversight. In addition, segmented case processing across the different divisions in a Law Center or Legal Services Support Section exacerbates case tracking problems. Before the Marine Corps CMS was deployed in February 2010, no single system or mechanism tracked a case across a Legal Service Support Section or Law Center.

The Marine Corps SJA told us he is considering regionalization options to make some functions more efficient and effective. He is also attempting to decipher the various local support arrangements to bring greater functionality to judge advocate services. In addition, he wants to standardize judge advocate operations and obtain authority to exercise professional supervision over legal services delivered in the field, authorities he currently lacks. A draft instruction to achieve these results has been distributed for comment.

There is no higher headquarters or other supervisory legal organization to oversee or monitor Marine Corps field units. Field staff judge advocates and officers-in-charge are totally autonomous in administering military justice. Their effectiveness depends on individual supervisor initiative, experience and aggressiveness.

Furthermore, the Marine Corps SJA does not have field supervisory authority. He may only encourage/suggest improved field practices. Only the Commandant of the Marine Corps may require or direct a specific practice.

**Experience base and staffing:** The Marine Corps field organizations suffer from essentially the same stressors as the Navy. Frequent deployments and numerous individual augmentee assignments often reduce staffing at ashore sites.

When we visited the site, the Camp LeJeune Legal Service Support Section was 15 enlisted members below its 45 member authorized strength due to deployments and temporary duty assignments. At the Camp Pendleton Legal Service Support Section, 23 officers were assigned against 32 billets. Of the 23 officers assigned, 8 were deployed, leaving 17 (53 percent) of 32 officers actually in place to perform the work. Of 56 enlisted billets, only 51 members were assigned and 18 of these were deployed. Only 33 enlisted members (59 percent of total) were in place to perform the work.<sup>14</sup> To compensate, five judge advocates had been sent to Pendleton on temporary duty assignments.

Captains, the bulk of the Marine Corps' judge advocate work force in the military justice area, are experiencing reduced litigation opportunities, leading to a growing experience gap. Traditionally, first-assignment captains spent 2-3 years learning their basic trade. That time has been cut nearly in half for many.

The Marine Corps has also experienced a grade compression impact. The reduced time in grade narrows a junior officer's experience base at the time he/she would normally assume a mid-level leadership position.

Another factor impacting military justice practice in the field is demand for battlefield deployments. The best military justice practitioners may be lost to these deployments.

**Processes/procedures:** A senior Marine official cited inadequate, nonstandard processes and procedures as the root cause for post-trial delays. Among the overall initiatives underway or planned, the Marine Corps SJA is establishing a uniform process for shipping records of trial to NAMARA. The process would require Federal Express shipping to reduce transit time, a requirement the other Services already have.

The Marine Corps SJA is also exploring using electronic records of trial to ease handling and shipping processes, and further reduce the processing time involved. A test project is currently underway between Camp Pendleton and NAMARA to develop business rules and protocols for electronic record of trial submission, a noteworthy initiative.

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<sup>14</sup> In commenting on the draft report, the Marine Corps advised that using the number of billets in the table of organization numbers (T/O) to determine whether legal personnel were appropriately assigned "does not provide an accurate picture," as the Marine Corps relies on staffing goals (a percentage almost uniformly less than the T/O) in assigning personnel to Marine units.



Information from interviews and document reviews demonstrate some current uniformity in the way Marine Corps legal offices operate. However, each has developed unique internal operating procedures (see Appendix M).

**Tracking systems:** Camp Pendleton has used the Marine Corps CMS, together with internal mechanisms, for case tracking since 2003. Since the new CMS came on line and the Commandant directed its use in February 2010, the Marine Corps CMS has become the primary tracking system at Camp Pendleton. The officer-in-charge, Legal Service Support Section, uses CMS reports to brief case status to his convening authorities weekly.

In an initial visit to the Camp LeJeune Legal Service Support Section we learned the unit had begun entering data in CMS, but the system did not capture all the information the unit needed/wanted to keep staff judge advocates advised on case status. The staff was working with the information technology specialist responsible for CMS modifications (at Marine Corps headquarters) to adjust CMS. The officer-in-charge was aware the Marine Corps SJA wanted to eliminate multiple tracking systems; however, the unit still needed information from its internal tracking mechanisms.

In a follow-up visit in June 2010, after training on the new system in May, the unit was using CMS exclusively to track cases and generate reports. The staff still considered CMS imperfect and wanted it to capture more data for field use, but the system appeared to be gaining credibility and confidence in the field.

The Quantico Staff Judge Advocate enters all data in CMS and uses CMS daily. He also uses internal mechanisms (spreadsheets) to track information not currently available in CMS, which he needs/wants for case tracking and reporting.

#### **d. Navy Tracking System**

Since October 2006, the Navy JAG has had a central case tracking system, CMTIS, which permitted case tracking through record of trial receipt at NAMARA. Since system modifications in May 2010, CMTIS now has data fields permitting case tracking through the appellate processes at NAMARA and the Court, and the U.S. Court of Appeals for the Armed Forces.

Although independent (afloat) staff judge advocates do not use CMTIS, the RLSOs use the system to report all data (from investigation through record of trial receipt at NAMARA) for all Navy cases under their cognizance, which includes afloat cases. These offices also assist/advise afloat units without staff judge advocates and, on request, assist afloat units with staff judge advocates assigned. The RLSOs enter data in CMTIS for the afloat units.

The Marine Corps does not enter data in CMTIS and generally does not use the system, although some Marine military justice personnel may use CMTIS to track cases after they enter the appellate process at NAMARA and the Court. However, the military judges who preside over Marine Corps cases after sentencing or acquittal enter a “few case data points” in CMTIS.<sup>15</sup>

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<sup>15</sup> After the Marine Corps CMS was fielded in February 2010, military judges are no longer required to enter Marine Corps case data in CMTIS. NAMARA now must rely on the Marine Corps CMS for information on Marine Corps cases.

According to the Navy JAG, he required military judges to enter Marine Corps data in CMTIS because his authority to require the Marine Corps to do so was uncertain. He said the ongoing Section 506 panel review should help resolve such authority issues.<sup>16</sup>

After Marine Corps cases arrive at NAMARA, missing data are supposed to be entered in CMTIS so the case can be tracked from receipt through appellate court decision. However, permission and access issues have impeded these efforts.

Prior to June 2010, individual divisions in NAMARA did not have access rights allowing them to enter missing field-level data, or correct erroneous field data in CMTIS. In fact, they did not have access rights giving them any visibility over cases pending in the field. NAMARA could not anticipate incoming workload, or identify cases it should have received.

To correct a field-level error or enter missing CMTIS data, NAMARA had to contact the field unit where the court-martial occurred, ask the unit to complete the data, and then wait for the correction to appear in CMTIS. This approach, however, did not work for Marine Corps cases because the Marine Corps did not use CMTIS. NAMARA had the information in records of trial received for appellate review, but was not permitted to correct field-level data in CMTIS.

Following major initiatives in 2002 and again in 2006 to identify lost/missing Navy and Marine Corps appellate cases (see Appendix K), NAMARA has performed cumbersome “audits” at least quarterly to identify possible lost or missing cases. These audits use information from:

- the Navy and Marine Corps Appellate Leave Activity to identify Navy and Marine Corps members who are on appellate leave after a court-martial conviction; and
- the Service Brigs confining Navy and Marine Corps members to identify convicted members still in confinement.

To identify possible lost and missing cases, NAMARA compares information from these sources with its record of trial receipts. Then, NAMARA follows up with individual field units as necessary to locate cases for which it has not received a record of trial to begin the appeal process.

The prior efforts appear to have resolved many possible lost case issues. Unfortunately, since NAMARA was not permitted to input or correct field-level case data in CMTIS, results from the continuing efforts generally have not been reflected in CMTIS. As a result, CMTIS continues to have missing and inaccurate data. In addition, as discussed later in this report, the audits did not identify all cases in which an accused was on appellate leave or in confinement.

We were given a CMTIS report identified as “All Moreno Cases” as of March 10, 2010. Although two of the three timelines in *Moreno* depend on the convening authority action date to determine compliance, most (81.9 percent) records in the CMTIS report did not include this date, as shown in the table below.

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<sup>16</sup> The National Defense Authorization Act for Fiscal Year 2010, Section 506, “Independent Review of Judge Advocate Requirements of the Department of the Navy,” requires “. . . an independent panel to review the judge advocate requirements of the Department of the Navy. . . .”

**Results of Analysis**  
**CMTIS Report Identified as “All Moreno Cases” on March 10, 2010**

Description	With CA Action Date		Without CA Action Date		Total	
	No.	%	No.	%	No.	%
<b>Cases with NMCCA Decision</b>						
Navy	50	84.7%	9	15.3%	59	100.0%
Marine Corps	5	3.3%	146	96.7%	151	100.0%
<b>Total</b>	55	26.2%	155	73.8%	210	100.0%
<b>Docketed with NMCCA/No Decision</b>						
Navy	41	82.0%	9	18.0%	50	100.0%
Marine Corps	4	2.5%	155	97.5%	159	100.0%
<b>Total</b>	45	21.5%	164	78.5%	209	100.0%
<b>Not Received at NMCCA</b>						
Navy	260	43.8%	333	56.2%	593	100.0%
Marine Corps	45	3.7%	1,184	96.3%	1,229	100.0%
<b>Total</b>	305	16.7%	1,517	83.3%	1,822	100.0%
<b>All Cases</b>						
Navy	351	50.0%	351	50.0%	702	100.0%
Marine Corps	54	3.5%	1,485	96.5%	1,539	100.0%
<b>Total</b>	405	18.1%	1,836	81.9%	2,241	100.0%

As can be seen above, the omission rate for convening authority action date was high for cases processed through NAMARA with Court decisions (73.8 percent), for cases processed through NAMARA and pending Court decisions (78.5 percent), and for cases not yet received at NAMARA (83.3 percent). Although the omission rate was higher for Marine Corps cases (96.5 percent), they were also high for Navy cases (50 percent) even though Navy field units were supposed to be entering the information in CMTIS.

We did not examine other missing data in the March 10 report in detail, but did note that 417 cases had record of trial receipt dates at NAMARA, which field units were responsible for recording in CMTIS. In comparison, as can be seen above, a total of 419 cases had passed through NAMARA and were either pending Court decisions (209 cases), or had Court decisions (210 cases). Thus, at least 2 cases (419 – 417) in the March 10 report were missing record of trial receipt dates.

In addition, about 40 percent of the 1,822 cases not yet received at NAMARA had sentencing dates predating 2008. About 12 percent predated 2007. Thus, these cases were more than 26 months old, and more than 38 months old, respectively, at the report date and still not received for appellate review. This information is shown in the table below.

**Results of Analysis**  
**CMTIS Report Identified as “All Moreno Cases” on March 10, 2010**  
**Age of Cases Not Yet Received at NAMARA**

<b>Sentencing Date in</b>	<b>Navy</b>		<b>Marine Corps</b>		<b>Total</b>	
2006	82	13.8%	136	11.1%	218	12.0%
2007	176	29.7%	329	26.8%	505	27.7%
2008	135	22.8%	299	24.3%	434	23.8%
2009	149	25.1%	358	29.1%	507	27.8%
2010	51	8.6%	107	8.7%	158	8.7%
<b>Total</b>	<b>593</b>	<b>100.0%</b>	<b>1,229</b>	<b>100.0%</b>	<b>1,822</b>	<b>100.0%</b>

We alerted the Navy JAG to these findings and our belief that at least some of these cases were not subject to appellate review.

Prior to system modifications in May 2010, CMTIS did not have a data field to track whether a court-martial was subject to appellate review. Further, the system still does not identify whether a convicted Service member waives the right to appellate review. Accordingly, there was no way for CMTIS to limit the report to only cases requiring appellate review.

As we were completing field work on this review, in May 2010, another old Navy case surfaced. In *U.S. v. Bartolo*, the accused was convicted in general court-martial on January 10, 2006, and was sentenced to 70 months confinement and a dishonorable discharge for committing indecent acts with a female under age 16. NAMARA never received the record of trial and did not know the case existed until brig personnel preparing to release the appellant from confinement called to check the appeal status. Staff in the servicing legal office claimed the case was mailed to NAMARA in 2006; however, CMTIS did not include data entries identifying an active case, and the responsible legal office never followed up to ascertain whether NAMARA received the case. The field office was responsible for entering the data in CMTIS and ensuring the case receipt at NAMARA.<sup>17</sup>

The Navy JAG directed an inquiry to determine what happened in this case. In addition, as a result of the case, NAMARA completed its most thorough “scrub” to date based on both brig and appellate leave activity records. Based on this scrub, NAMARA officials advised us they were “99.5 percent certain” they had located all missing appellate records.

Following *Bartolo*, the Navy JAG directed a physical file review to address all “unaccounted for” cases identified in CMTIS, which included our concerns about unaccounted cases in the March 10 CMTIS report described above. Following this physical file review, in a meeting with the Navy JAG and his senior staff on July 8, 2010, we were told:

- Prior to fielding CMTIS in October 2006, Navy JAG did not have a central case tracking system and, although a central system was not required, he realized maintaining

<sup>17</sup> The March 10, 2010 “All Moreno Cases” CMTIS report described above did not include appellants’ names, so we could not determine if the *Bartolo* case was included in this report.

visibility over courts-martial and completing required appellate reviews was critical to his mission.

- Upon becoming the Navy JAG in August 2009, his emphasis was on “getting it right” in the future, not on correcting the past.

- They had viewed problems with pre-October 2006 cases in CMTIS (partial case records “rolled-up” into CMTIS from prior systems) as problems with legacy recordkeeping, not problems with CMTIS.

- the Navy has now physically reviewed files and accounted for every Navy and Marine Corps case entered in CMTIS since October 1, 2006 (month CMTIS was fielded).

- 833 Navy cases were all accounted for.<sup>18</sup>
  - 263 Marine Corps cases were all accounted for, even though they had to go back to the field on 57 cases, and initially identified 4 “live round” cases (detailed below).

- They did not physically review the files in 35,218 cases in CMTIS predating October 1, 2006, but 100 percent are either closed or under “positive NAMARA control.”

- They have not been willing to devote the approximately 1.6 staff years needed to physically review files in all 35,218 cases in CMTIS predating October 2006.

- They have reviewed files in every case involving a sailor or marine still in confinement, and are sure another *Foster* case will not happen.<sup>19</sup> (They could not give us the same assurance regarding cases in which a convicted sailor or marine is no longer serving time. They also could not give us assurance that every case CMTIS should have captured was actually in the system.)

- The CMTIS reports NAMARA needs for case management should be ready in 2-3 months. The Assistant Judge Advocate General for Military Justice agreed his office could continue current ad-hoc tracking mechanisms until then.

- The RLSOs are already required to use CMTIS and, in the next 2-3 months, will be instructed not to use internal tracking systems/mechanisms. (They will need the internal systems until such time as they can rely on CMTIS data and have the capability to complete ad-hoc queries and reports based on CMTIS data.)

Upon following up on the Marine Corps cases identified as “live round” cases, we learned:

- Initially, several hundred cases from CMTIS were erroneously identified as not forwarded to NAMARA. Upon reviewing the files and other CMTIS reports, NAMARA (Administrative Support Division) determined 57 Marine Corps cases potentially still required post-trial action.

- The Marine Corps determined CMTIS inaccurately showed Article 66 reviews were necessary in 47 cases (not actually required), had not been updated to show appellate reviews were completed in another 5 cases, and incorrectly showed another recent case as late, leaving 4 unaccounted cases. With respect to these four cases, the Marines all had been discharged --

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<sup>18</sup> We randomly selected 20 cases from this list, and verified they were accounted for in the Navy and Marine Corps physical file reviews.

<sup>19</sup> We randomly selected 21 cases from 382 names on the world-wide brig list (12 brig locations), and verified they were accounted for in the Navy and Marine Corps physical file reviews.

they either reached the end of active service (EAS), or were administratively separated. None had a punitive discharge executed, although two had bad conduct discharges (BCDs) adjudged. The BCDs were suspended in pretrial agreements (PTA). Details on the four cases were:

- Bolla (1stMarDiv) – Trial date was April 11, 2006. Sentence was 12 months confinement, reduction in rank to E-1 (Private), and forfeit \$848.00 a month for 12 months. Convening authority action was on June 21, 2006. An Article 64 (Judge Advocate) review, rather than the required Article 66 review, was conducted erroneously on June 28, 2006. The case is being sent to the convening authority to see if the initial action should be modified. (1,479 days from convening authority action until we were told the case was being returned to the convening authority.)
- Stagner (29 Palms) – Trial date was July 11, 2006. Sentence was 1 year confinement, reduction to E-1, and a BCD. Convening Authority Action on March 7, 2007, suspended the BCD and confinement over 6 months. The responsible staff judge advocate erroneously believed the suspended sentence did not trigger an Article 66 review and did not send the case to NAMARA. The Marine reached end of service and received a general discharge on December 7, 2006. The case was sent to NAMARA on June 30, 2010. (1,211 days from convening authority action until the record of trial was sent to NAMARA.)
- Thibodeau (K-Bay) – Trial date was June 9, 2008. Sentence was 52 days confinement, reduction to E-1 and a BCD. Convening authority action on October 24, 2008, suspended the BCD for 12 months (now remitted). The Marine was administratively separated (other than honorable--OTH--discharge) on February 19, 2009. The case was mailed to NAMARA on June 29, 2010. (613 days from convening authority action until the record of trial was mailed to NAMARA.)
- Brock (3d MAW) – Trial date was December 4, 2008. Sentence was 12 months confinement and reduction to E-1. Convening authority action on June 22, 2009, suspended confinement in excess of 6 months for 8 months (now remitted). Pursuant to a board waiver, the Marine was administratively separated (OTH discharge) on October 7, 2009. The case is being sent to NAMARA. (582 days from convening authority action until we were told the case was being sent to NAMARA.)

The Marine Corps advised it is working with commands to ensure these and other cases are properly handled in the future. The Marine Corps is also giving refresher training on the requirements for Articles 64, 66, and 69 reviews.

A Center for Naval Analyses study is currently reviewing the Judge Advocate General Corps' information technology needs. This study includes benchmarking various other systems against CMTIS to assess options available to the Navy. The Center for Naval Analysis requested and the Marine Corps demonstrated its CMS for this study twice, once in March 2010 and again in June 2010.

#### **e. Marine Corps Tracking Systems**

Commandant of the Marine Corps Administrative Order (MARADMIN) 062/10, "Implementation of Case Management System for Courts Martial," February 1, 2010, mandated that all Marine legal offices use the Marine Corps CMS fielded in February 2010. According to the order, CMS creates a common operating picture for all military justice practitioners,

enhances ability to generate reports, improves data capture for reporting purposes, and increases visibility over cases from the local office through the appellate process.

Local staff judge advocates and officers-in-charge are now able to view all cases within their cognizance. In addition, for the first time, the Marine Corps SJA is able to view all cases in the Marine Corps and has real-time access to the data. Based on initial feedback from the field, the Marine Corps CMS has significantly improved Marine Corps visibility over military justice administration, including post-trial review, in the Marine Corps and the software contractor is continuing additional improvements to meet user needs throughout the Marine Corps.

The Marine Corps CMS is also available for NAMARA to track cases from trial date through mailing the record of trial to NAMARA. In the future, this access should help NAMARA maintain visibility over Marine Corps cases throughout the post-trial process.

The Marine Corps CMS is a field-level tracking system enabling Marine Corps field legal offices to monitor cases in progress. The system:

- tracks a case from the date a command requests legal services or imposes pretrial restraint until NAMARA “dockets” the case;
- has capability to calculate total elapsed time from first data entry until last data entry in any Marine Corps case;
- captures several data points relating to the time required to perform a post-trial review, e.g., time with the court reporter, trial counsel, military judge, staff judge advocate, and convening authority;
- permits any authorized user to enter changes/corrections, and generate custom reports;
- permits Marine Corps headquarters offices and NAMARA to have system access and “see” cases in the field; and
- does not capture case processing activity at NAMARA and the appellate courts.<sup>20</sup>

The Chief, Military Law Branch, Marine Corps headquarters, is tasked with monitoring all pending cases for compliance with *Moreno* timelines. This tasking is part of an effort to build a sense of urgency (in the field) about the post-trial phase.

Each week, the Chief, Military Law Branch, prepares a tracking report directly from CMS displaying all cases pending in the field, by unit, along with a post-trial clock showing the time elapsed from sentencing date to current day. The tracking report has a "red stoplight" icon identifying each case exceeding the 120 day *Moreno* timeline, i.e., sentencing date to convening authority action date.

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<sup>20</sup> As noted previously, the Navy JAG no longer requires military judges to enter Marine Corps case data in CMTIS, and NAMARA now has access to enter data in CMTIS. In the future, NAMARA must enter Marine Corps cases in CMTIS to begin appellate case tracking.

The March 8, 2010, tracking report listed 127 cases, 31 with convening authority actions. Of these 31 cases, 7 exceeded the 120 day Moreno standard—the excess ranged from a few days to 151 days. Of the remaining 97 cases (without convening authority actions), 10 exceeded the 120 day standard at the report date.

This Marine Corps-wide information is visible and readily obtainable at headquarters, which is a significant improvement in tracking capability not existing even a few months ago. This capability, however, did not detect the “live round” cases with lengthy delays described above in connection with the Navy CMTIS capability.

#### **f. Case Management/Electronic Case Filing**

During interviews with various officials in NAMARA, the Army and Air Force appeals courts, and the Court of Appeals for the Armed Forces, the officials expressed great interest in enhancing their relatively rudimentary electronic case management capabilities. They stated interest in the internet-based Case Management and Electronic Case Filing (CM/ECF) system currently used throughout the Federal district court system, the U.S. Circuit Courts of Appeal, the Bankruptcy Courts, and the Court of Appeals for Veteran’s Claims.

The Court of Appeals for Veterans' Claims recently transitioned to this system. We interviewed one of the court’s judges, the former Judge Advocate General of the Air Force. He told us the CM/ECF system is an impressive case management and electronic filing system, which he has recommended to the Air Force Court of Criminal Appeals.

The Clerk of Court for the Court of Appeals for the Armed Forces told us the court would very much like to implement CM/ECF, but lacks authority to mandate the use. Instead, the court recently instituted an electronic filing program for petitions to that court.

Both Navy and Marine Corps Reserve and active duty counsel told us they believe the system would be a marked improvement over other data management systems. In fact, the Service courts of criminal appeals have discussed this system at length in previous conferences, and an Appellate Government Division (Code 46) representative has briefed the system to each Service court of criminal appeals.

Overall, we found unanimous interest in implementing this type system in all the Services, but neither DoD nor a Service has stepped forward to spearhead the implementation due to cost considerations, possible transition difficulties, and inadequate consensus among the Service Judge Advocates General. Because they have not reached an agreement, problems continue with the multiple, different Service systems, which judges on the Court of Appeals for the Armed Forces have noted.

During this review, we heard about various CM/ECF features and possible difficulties with adopting the system in the military. This information is included in Appendix N. Also, in our last meeting, the Navy JAG advised us the ongoing Center for Naval Analyses study, which included benchmarking CMTIS against CM/ECF and other systems, is revealing potential problems with the military adopting CM/ECF.



In our view, any study/evaluation involving CM/ECF or a similar system should include military justice practitioners (active duty, civilian, and Reserve) familiar with the system to ensure a thorough, balanced assessment. A standard electronic case filing and management system for military courts-martial could yield immense savings in time and funds.

**g. Administrative Support Division (Code 40)**

The Administrative Support Division in NAMARA has a standard operating procedure for case receipt, review, and quality control. Upon completing a review, a checklist is prepared identifying (among other things) data entries needed in CMTIS. Normally, the Administrative Support Division reviews and forwards all records of trial to the Court within 1-2 days after receipt from the field. This time applies to cases requiring appellate court review, as well as those sent to the Criminal Law Division (Code 20) for Judge Advocate General review.

The Deputy Director, a civilian employee, provides stability, continuity and experience in a unit generally staffed with junior Marine Corps enlisted members. The current Deputy, however, is nearing retirement. The Navy should consider hiring and training a replacement before the retirement to prevent a disruption possibly exacerbating the overall case processing delay problems, which have continued over the years.

We were told that 4-5 years ago, 15-20 percent of all cases received in the Administrative Support Division were "trouble" cases--something was wrong with the record of trial arriving in the division, requiring corrective action by the field unit responsible for the court-martial. We were also told the "trouble" rate is now down to about 1 percent, and resolving a trouble case now generally takes no longer than 48 hours. If a trouble case is not resolved quickly, the Assistant Judge Advocate General for Military Justice (Code 02), personally contacts the unit. Prior to the current procedure, a trouble case might not be resolved for 8-9 months.

Prior to the current Assistant Judge Advocate General for Military Justice, 70-80 court mandates (cases the Court or the U.S. Court of Appeals for the Armed Forces, returns for corrective action, e.g., rehearing on sentence) could be pending in the field at any given time without any overall visibility, or even a tool to monitor the mandates or their individual status. Today, with the mandate tracker developed internally and the office's constant oversight, as of March 5, 2010, there were only 16 pending court mandates and NAMARA had visibility over those mandates.

The improvements resulted from several efforts:

- the Criminal Law Division's focus on timely administration in its "Newsmailers" (information bulletins);
- greater field unit adherence to the Manual for Courts-Martial checklist for assembling records of trial; and
- improved training at the Naval Justice School.

These efforts improved record of trial assembly in the field, reducing errors in records of trial received at NAMARA.

However, Navy and Marine Corps processes still vary by unit. According to the Director, Criminal Law Division, more standardized procedures and checklists are needed, and a larger civilian support structure would enhance continuity.

Overall, the Administrative Support Division (Code 40) now has good processes in place and there is no case backlog. Due to a Lean Six Sigma<sup>21</sup> process completed in approximately 2007, the division reduced processing times to the current 1-2 day turnaround. (See Appendix K)

#### **h. Appellate Defense Division (Code 45)**

Overall, the Appellate Defense Division is currently functioning well. Cases are progressing through the division in a timely fashion, despite some limiting factors.

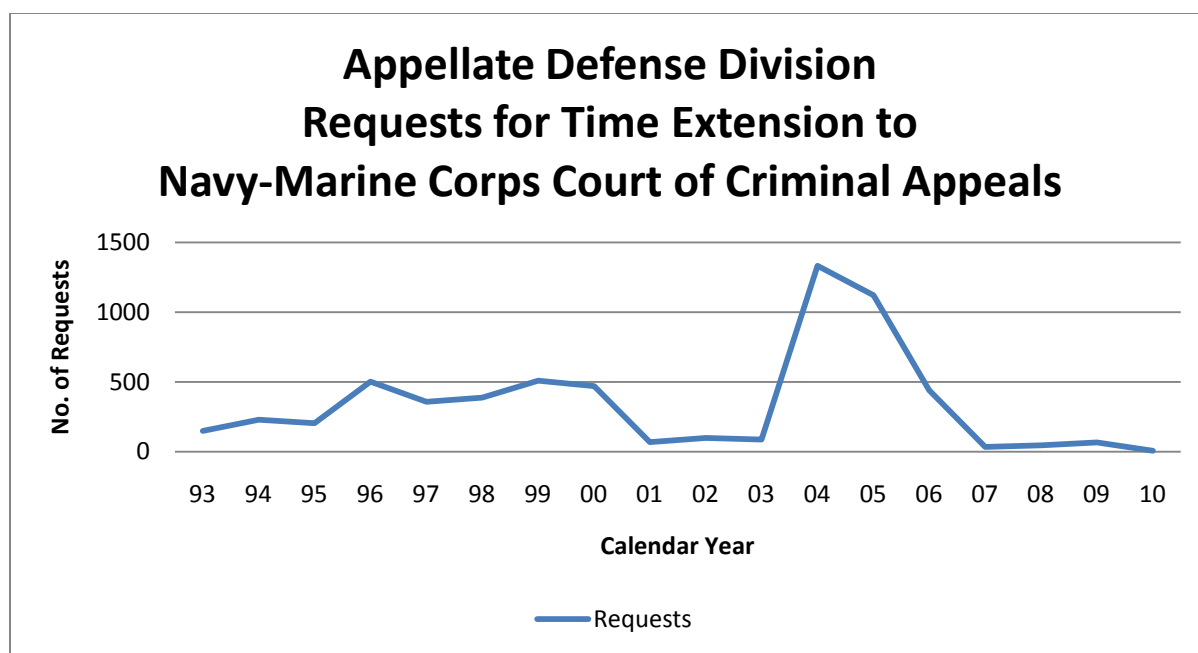
The Navy and Marine Corps tracking systems do not provide sufficient data for us to assess exact processing times in the appellate divisions (see Appendix K). However, when sending a case to Appellate Defense for review, the Court assigns a deadline for receiving defense briefs. If Appellate Defense cannot meet the deadline, an extension of time may be requested. If the request is justified, the Court will grant a time extension.<sup>22</sup> Although case complexity and record of trial length are the primary factors affecting the time required to review a record of trial, the number of extension requests and their lengths can be indicative of both workload and case age.

The graph below depicts the number of time extensions requested. Although not as good an indicator as the number of time extensions granted, the table provides some meaningful insight into both caseload and processing time.

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<sup>21</sup> A set of tools and methods for improving business processes used in both service companies and public sector agencies.

<sup>22</sup> As indicated in Appendix K, this is a significant change from the time when the appellate divisions had an agreement permitting up to 24 time extensions before a division would object, and the Court approved the requests without requiring justification.



\* Data for CY 2010 is as of mid-February

The graph shows marked improvement beginning in 2005 and continuing into the current year. As of February 2010, the Appellate Defense Division had not requested a time extension in connection with any case pending in the division.

In providing this information, the Appellate Defense Division advised the data source was CMTIS and, thus, not completely trustworthy. Our specific conclusions in this report rely on this data only to the following extent: we believe the data reasonably establish the trend over time, reasonably show time extensions are no longer used as the primary technique to deal with high workloads and/or case backlogs, indicate caseload is now managed more timely, and division staffing is sufficient.

**Civilian Deputies:** To enhance continuity and experience, particularly in the appellate practice areas, the Navy JAG directed and NAMARA civilianized the deputy positions in the appellate divisions in 2009. The current Deputy Director, Appellate Defense Division (Code 45), has experience as both an active duty and Reserve appellate defense counsel, and brings good experience and management skill to the division. This Deputy is developing what will become a standard training and mentoring program. We were shown several lesson plans developed to date, which outline fundamental, common issue areas they encounter in practice. The Deputy personally reviews the materials with each new counsel.

The division has eight appellate counsel on staff, not counting the Director who was detailed full-time to other duties outside the office at the time of our interviews. Twenty-seven Reserve judge advocates assist the division, reviewing virtually all "thins" (smaller cases with less than 200 pages).

The Deputy has implemented several initiatives to improve oversight and business practices in the office. For example, a non-attorney staff member previously assigned cases. The Deputy now performs the duty to assure an equitable and balanced case distribution.

Two relatively recent Navy JAG policies have greatly enhanced productivity and addressed past problems:

- appellate counsel will not be deployed or assigned to individual augmentee duty; and
- no first-tour judge advocate will be assigned to the division.

Further, although not required, the Appellate Defense Division has been consulted about potential assignment candidates in recent times. Division management has been satisfied with the quality of personnel assigned to the office.

**Director turnover:** One problem, which recently recurred, is frequent turnover in the Director position. At the time of our interviews, the current Director had been reassigned to other duties (Section 506 panel) and his incoming replacement, slated for summer arrival, had also been re-directed to other duties.<sup>23</sup> This trend adversely impacts the Deputy's ability to attend to training and other duties. Conversely, it demonstrates the value of having a civilian deputy to assure continuity.

**Reservists:** Another more recent development is the decline in experience level for Reserve unit personnel supporting the Appellate Defense Division (Code 45). Currently, all newly-separated active duty judge advocates must now be assigned first to a more traditional drill unit in the Reserve. As a result, the Appellate Defense Division does not receive these experienced Reservists and the overall experience level is declining. After inquiring about this policy, the Navy gave us a detailed explanation, which concludes:

*... our policy is to place new accessions in the RLSO [Region Legal Service Office] and NLSO [Naval Legal Service Office] units. These units can best provide the mentoring and administrative support necessary to prepare junior officers for a career in the Navy Reserve. They provide an opportunity to complete career milestones for junior Reserve officers such as Reserve Pay officer, Training Officer, and Unit Administrative Officer. Additionally, placing new officers in units with other new accessions and junior officers allows those officers interaction with their peers, close supervision and mentoring by unit senior leadership, and competitive fitness reports. This also seems to work best for officers who are simultaneously embarking on Reserve careers and new civilian careers. It allows them to compartmentalize their Reserve duties and keeps Reserve duties from overwhelming them and their new civilian supervisors. We believe that these appellate skill sets will not become stale while new accessions complete their first tours in a RLSO or NLSO unit, and they*

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<sup>23</sup> In commenting on the draft report, the Navy JAG advised that the replacement assumed the duties as assigned in summer 2010.

*will then be able to join an Appellate unit after they have successfully transitioned into the Reserve program.*

*By analogy, on the active duty side, the JAG Corps does not generally detail Law Education Program graduates directly onto line staffs as independent duty Staff Judge Advocates, even though the new LEP may have specific unrestricted line experience that would be valuable to that billet assignment. Instead, most are detailed . . . to OJAG or to RLSO or NLSO staffs as department heads. This allows them time to learn about the JAG Corps, even though they are already experienced Naval officers. Once they have completed their initial tour, then they can and are detailed to independent duty on line staffs and perform exceedingly well.*

The appellate divisions rely heavily on Reserve support to accomplish their missions. Reserve support played a large role in clearing the immense case backlogs plaguing Appellate Defense and the Court in this decade. Therefore, it will be important to assure the Reserve unit in the Appellate Defense Division maintains a cadre of knowledgeable, qualified counsel.

**Time Extensions:** Excessive Court-approved time extensions to submit briefs, and lengthy appellate delays were the norm in the early to mid-2000 timeframe (see Appendix K). As of March 4, 2010 (date of our last interview), the Division did not have cases pending initial pleadings in which a time extension had been requested. All cases were completed in the initial briefing period allowed. Before counsel may request a time extension, both the Deputy and Director must review and sign off before the request goes to the Court.

**Law Clerks:** In 2008, the previous Navy JAG established 1-year law clerk positions on the Court. The intent was for judge advocates serving as law clerks to gain work experience enhancing their training and preparation for follow-on assignments as either appellate defense or appellate government counsel.

Feedback from both the Appellate Defense Division (Code 45) and the Appellate Government Division (Code 46) is this program, while well-intentioned, has not improved appellate practice and may have had a reverse effect in both divisions. The 1-year tour with the Court reduces the usual 3-year tour the judge advocate would serve in an appellate division, leaving only 2 years for appellate counsel duty. Further, the law-clerk experience has not prepared the individuals sufficiently for appellate duties, which requires another 6 months or longer after an individual judge advocate arrives to work in the Appellate Defense or Government Division.

As a result, the appellate division has a fully productive counsel for only about 1 year and a much higher turnover rate. In the Appellate Defense Division (Code 45), this situation exacerbates attorney-client relationship issues and, thereby, affects the quality of representation. Based on actual experience, the law clerk initiative should be reviewed and adjusted appropriately.

**Case Tracking:** CMTIS is generally ineffective for the Appellate Defense Division (Code 45). The managers see the Knowledge and Information Services Division (Code 65) as unresponsive to system change requests.

An additional issue for the Appellate Defense Division has been its inability to automate records. The Deputy has repeatedly asked field units to “burn” records of trial onto compact discs and submit the electronic versions. When dealing with lengthy records and preparing briefs, defense counsel must frequently find and refer to specific words and passages in the record, which is difficult and time consuming when using hard-copy records. The search/find capability available with an electronic record would significantly reduce both the difficulty and time involved in locating specific material.

**Trial Defense Counsel:** The Navy is the only Service without a Chief Defense Counsel, and does not have an office responsible for trial defense services Navy-wide. Consequently, no one office is developing policies or training programs tailored to the community's needs, and no one person is overseeing the competence, delivery, or efficiency of defense services in the field. Unique issues and challenges confront the defense counsel community, and not having a functional head represents a significant leadership vacuum in defense practice.

The Navy JAG told us he plans to develop a formal Defense Counsel Assistance Program because the need for more assistance to the defense community has become apparent. At minimum, he intends to establish the program and is considering establishing a defense command. He has not decided on a specific solution, but establishing a formal Defense Counsel Assistance Program has been adopted as a JAG 2010 priority action item.<sup>24</sup>

#### **i. Appellate Government Division (Code 46)**

Current practice in NAMARA depends on hard copy records. Paper records of trial and pleadings are given to the Administrative Support Division (Code 40), the Court (Code 51), and the appellate divisions (Codes 45 and 46). Pleadings, briefs, and reply briefs are all paper documents, hand carried from one office to another, with support clerks subsequently recording the delivery and receipt information in CMTIS.

NAMARA (including the appellate divisions) does not have high-speed scanner capability to upload records of trial into electronic form. A current scanner, although recently upgraded, cannot handle the Appellate Government Division's routine litigation needs, which involve thousands-of-page court documents.

Based on internal initiative and support from the Assistant Judge Advocate General for Military Justice, the Appellate Government Division works electronically using the Marine Corps' SharePoint web-based, information-sharing site. Although up-loading lengthy records of trial is not possible, all working documents and taskings are up loaded to the site and all division personnel can access the information. SharePoint is the division's “one-stop” management and tracking tool.

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<sup>24</sup> On October 1, 2010, the Naval Legal Service Command (NLSC) was reorganized, separating the Naval Legal Service Offices (NLSOs) and Region Legal Service Offices (RLSOs) into two functional groups, eliminating the NLSC Vice Commander position, and creating new Deputy Commander, RLSOs, and Deputy Commander, NLSOs, positions with authority and resources to manage and supervise courts-martial case processes. The Commander, NLSC, also established a Defense Counsel Assistance Program (DCAP) and a Trial Counsel Assistance Program (TCAP).

The Appellate Government Division is currently working to give the field additional information on SharePoint. The division is also developing a military justice blog to use in updating prosecutors on military justice developments and practice tips. The division was able to configure SharePoint to meet its needs, e.g, due date tracking, in a way CMTIS could not be used.

**Staffing/experience:** Current staffing is adequate for the caseload. There are 10 appellate counsel (one deployed), and 2 civilian support personnel. As in the Appellate Defense Division, the Deputy Director is civilian, a recent initiative to enhance continuity. The Deputy Director, a former Marine major, became the Deputy after the military deputy was reassigned.

Most appellate counsel serve 3-year tours. Virtually all Appellate Government Division (Code 46) counsel are second-tour Marine Corps captains/ Navy lieutenants. Although they all should have had some military justice experience in their first tours, we were told some arrived at the appellate division with little to no military justice experience.

**Law Clerks:** As noted in the Appellate Defense Division section above, the Appellate Government Division's experience with the law clerk program has not been a useful or effective training enhancement, and has reduced tour length in the division. The director would prefer all his counsel serve the full 3-year tour.

**Training:** As part of the current Director's professional development program, all Appellate Government Division counsel are sent to a local civilian course on appellate brief writing. Other training courses include:

- the Appellate Judges Educational Institute Conference;
- the Association of Government Attorneys in Capital Litigation Conference;
- D.C. Bar Association's Appellate Advocacy seminar; and
- the annual Court of Appeals for the Armed Forces Conference.

These courses are considered essential for a counsel's professional development. The Director would like a more standardized, uniform training program for both field trial counsel and appellate counsel, with stable funding to assure continuity.

**Operating Procedures:** When a case/defense pleading comes to the Appellate Government Division, the Deputy Director assigns an attorney based on evaluating the case complexity and individual counsel workloads. The Deputy creates a "task," assigns the case, and establishes suspense dates, all on SharePoint. The division does not have a high-speed scanner with capability to upload lengthy records of trial to SharePoint, but the Deputy arranges to upload case pleadings and other case information, and the assigned counsel processes the case in SharePoint.

A recent innovation included assigning an experienced mentor, usually an experienced Reserve judge advocate, to help the appellate government counsel. The Division Director and Deputy meet daily to review case status.

The collaborative SharePoint technology allows Reservists assigned to the division, without regard to location, to review, edit, and comment on a brief. Reservists, several of whom currently are experienced Federal and state appellate attorneys, are valuable additional assets for the division.

The only remaining challenge to an efficient case processing and archiving system for the division is not having the high-speed scanning capability needed to upload lengthy records of trial to SharePoint. This capability would enhance overall case processing timeliness and effectiveness. For example, attorneys then could search for key words, phases, or legal arguments electronically, rather than manually searching the paper records of trial, possibly multiple times.

**Trial Counsel Assistance Program:** The Appellate Government Division supports the Trial Counsel Assistance Program, a program to advise field trial counsel on military justice litigation matters. Under this program, the division advises both Navy and Marine Corps prosecutors, using SharePoint as the platform to answer questions and share information. Email is used to answer questions directly, but both the issues and answers are uploaded to SharePoint for archiving and sharing. The Army and Air Force have been invited to participate on this site.

Another resource for information sharing currently being explored is a military justice blog, a discussion forum on SharePoint for those interested in the latest updates and advice and tips on military justice practice from a prosecutor's perspective. Previously, the Director sent emails with military justice updates and practice tips to the field, but this practice proved too cumbersome.

**Technology:** Anyone with access rights/permissions to the SharePoint site can monitor current cases, including tracking case status and action on any time extension request. A user can review all pleadings relevant to an appellate litigation. Once access becomes available to the high-speed scanner capability needed, the Appellate Government Division intends to upload and have the entire record of trial available on SharePoint.

#### **j. Chief Judge of the Navy (Code 05) and the Court (Code 51)**

The Court experienced several significant problems in the early to mid- 2000 timeframe. A case backlog overwhelmed the Court, exposing problems with insufficient staffing, inexperienced and unproductive appellate judges, ineffective detailing methodology for judge assignments, and ineffective case tracking and prioritization systems (see Appendix K). These problems led to significant changes and improvements.

**Chief Judge of the Navy.** In 2007, at Navy JAG request, the Secretary of the Navy established a new capstone position, the Chief Judge of the Navy, to oversee the entire Judiciary, both trial and appellate operations. The Chief Judge is the reporting senior for all appellate judges on the Court.

The Chief Judge's ability to rate and supervise the appellate judges addresses the Article 66 proscription against any appellate judge rating or otherwise affecting a fellow judge's evaluations and assignments (see Appendix K). In the past, limited supervisory authority was asserted as a key



problem in addressing less productive and less committed judges on the Court, a problem the new Chief Judge position should remedy.

In addition to addressing supervision and rating issues, the new Chief Judge position creates a community sponsor and resource advocate, one who can monitor professional competence, promote needed training initiatives, and supervise the Judiciary overall while assuring professional independence.

**Judicial staffing and experience:** As discussed in the O'Toole report, the increase to 13 active duty judges and 11 supporting Reserve judges in January 2006, immediately impacted the Court (see Appendix K). The Reserve judges use "flex drills" (roughly equivalent to telecommuting) to review many appellate cases submitted for adjudication. These cases are mostly guilty-plea cases involving less than 100 pages.

Additionally, during regular drill periods, Reserve judges are assigned to standing panels and assist in resolving larger, more complex cases. Their contributions are significant, accounting for 25 percent of the Court's case dispositions in calendar year 2008.

In 2007, the number of active duty judges increased to 17, but began declining in 2008, after a significant reduction in the case backlog. More important than the increase in numbers, in 2007, the Navy JAG increased former trial judge assignments to the court, and required designating up to four Court positions for officers in the Military Justice Litigation Career Track. In 2009, the Navy JAG clarified that one appellate judge on each panel must be a former trial judge. The Court, as presently composed, meets these requirements, but the requirements have not been included in policy.

As of July 1, 2009, there were four former trial judges on the court (three Navy and one Marine Corps), including a Military Justice Litigation Career Track "Specialist" and the Chief Judge. The Chief Judge is both a former trial judge and a designated Military Justice Litigation Career Track "Expert."

Many appeal cases involve pre-trial and post-trial procedure issues that non-career litigators with significant staff judge advocate experience can handle readily. However, the Court's history supports a conclusion that the most difficult appeal cases involve evidentiary, criminal law, and procedural trial issues. Former trial and appellate judges are more competent to resolve these cases correctly and efficiently. Thus, it is important to maintain a balanced mix of former judges and experienced staff judge advocates in the Court's composition. The latter bring a different perspective and experience base that helps inform court decisions. Those who have spent extensive time on the bench can become somewhat insulated from operational realities in everyday military life.

Over the last 2 years, the total number of active duty judges assigned to 3 panels ranged from 9 to 11, with 2-3 Reserve judges assigned to each panel (10 Reserve judges currently assigned). This staffing is sufficient for the current caseload. By the end of summer 2010 rotations, the Court will be staffed with 10 judges and 7 law clerks for 3 panels.

**Judicial Screening Board:** Under another initiative implemented in 2009, the Judicial Screening Board screens applicants for both trial and appellate judgeships. Those interested in a judge position must submit an extensive application explaining why they want the position, outlining the cases they have tried, and attaching their law school transcripts and fitness reports. One objective is to staff the

Court with three to five professional military justice litigation experts or former trial judges. The Chief Judge must be a career track litigation expert. The Court will also have three Marine judges and judges with staff judge advocate backgrounds, all with significant military justice experience.

**Current Caseload:** The staffing surge and decline in military justice caseload in recent years assisted the Court in regaining control over its docket. According to the Clerk of Court, who has been in the position since 2000, the Court has never been in better shape.

The Court's caseload on December 31, 2009, is shown in the table below in comparison to three other dates: July 2009 (when the O'Toole report was issued); April 2006 (immediately prior to the *Moreno* case when the Court was backlogged); and December 2000 (when a large backlog was building in the Appellate Defense Division, but had not reached the Court). The table shows the backlog, which inundated the Court in the mid-2000 timeframe, has been eliminated. As of December 2009, no case was over a year from docketing (the *Moreno* standard is 18 months) and only 4 cases exceeded 6 months from docketing.

**Navy and Marine Corps Appellate Cases  
Docketed with Appellate Court, and  
Pending Decision in Judicial Panels**

Date	# Cases Docketed	# Cases Pending In Panel		# Cases In Panel > 6 Mos		# Cases In Panel > 12 Mos	
	No.	No.	% *	No.	% **	No.	% **
12/31/00	1,319	87	6.6%	7	8.0%	0	0.0%
04/30/06	794	325	40.9%	24	7.4%	14	58.3%
07/01/09	320	173	54.1%	7	4.0%	0	0.0%
12/31/09	189	75	39.7%	4	5.3%	0	0.0%

\* Percentage of total cases docketed

\*\* Percentage of total cases in panel

**Tracking:** The Court uses three monthly CMTIS reports to oversee case progress. First, a *Moreno* report showing cases by trial date, date docketed with the Court, and date sent to panel. The second report lists cases according to the type court-martial involved and final disposition, showing the time in panel and listing the date docketed, date to panel, and number of pages. This report helps individual judges assess their workload and case age. The third report, a "judge activity" report, lists cases and case status by individual judge. The Chief Judge and Senior Judges on the Court receive an additional, more comprehensive management report with additional detail on the Court's activities.

The Chief Judge of the Navy created additional internal tracking reports to assist his oversight and management responsibilities. These reports include CMTIS information, but are not system generated. One statistic the Chief Judge examines is the number of cases tried in the past 90 days. This statistic helps the Chief Judge anticipate future caseload and adjust court staffing, if required.

There is no fixed metric or standard governing case production except the timelines mandated in *Moreno*. The Chief Judge has asked the Chief Trial Judge to track record of trial authentication times. Although this process point has not been a problem area historically, monitoring court-martial process points is a prudent practice to identify emerging problems early.

**Time Extension Policy:** Excessive time extensions (number and length) were a significant problem in the past (see Appendix K). In the post-2000 timeframe, prior to 2007, an initial 120 day time extension, and 6 or more time extensions in an individual case, were common. Now, appellate defense may receive an initial 60 day time extension, but any subsequent request may not exceed 30 days. Furthermore, on February 1, 2010, new Court rules imposed strict guidelines and required very specific and well-substantiated reasons for requesting a delay. The chart below shows the significant improvement experienced beginning in 2006 and continuing currently.

**Navy-Marine Corps  
Court of Criminal Appeals  
Time Extensions Granted**

<b>Calendar Year</b>	<b>No. Time Extensions</b>
<b>2003</b>	<b>88</b>
<b>2004</b>	<b>1333</b>
<b>2005</b>	<b>1122</b>
<b>2006</b>	<b>441</b>
<b>2007</b>	<b>34</b>
<b>2008</b>	<b>46</b>
<b>2009</b>	<b>66</b>
<b>2010 *</b>	<b>0</b>

\* At about January 22, 2010

**k. Military Justice Litigation Career Track**

A number of initiatives have been developed to increase military justice competence across the Navy Judge Advocate General Corps. Among them, a Military Justice Litigation Career Track, first implemented in May 2007 (JAGINST 1150.2A, "Military Justice Litigation Career Track," June 17, 2009). As caseload declined but became more complex, and as the operations tempo/deployments increased, the cumulative effect was reduced time in the courtroom and eroded litigation experience (degree and quality) across the Navy, a trend all the Services experienced. The Military Justice Litigation Career Track initiative was intended to address this growing problem among Navy judge advocates.

JAGINST 1150.2A created a career path for litigators to develop and expand their experience. It also tasked senior litigators with identifying and developing judge advocates who demonstrate significant military justice knowledge and trial advocacy skills, thereby (1) developing the military justice litigators needed to improve effectiveness and efficiency in the courts-martial

process, and (2) forming the nucleus for a “reach-back capability,” i.e., a pool from which experienced trial practitioners and staff judge advocates can be selected.

Applicants, generally senior 0-3 (lieutenant) and 0-4 (lieutenant commander) officers, may apply for entry into the career track through annual selection boards. Senior, experienced Navy litigators comprise these boards. A judge advocate who demonstrates the requisite quantitative and qualitative experience in military justice litigation may be selected for the Military Justice Litigation Career Track.

The Navy has designated 49 positions for Military Justice Litigation Career Track officers, and within 5 years plans to have a qualified pool (65 officers) to sustain the community. As of June 2009, the qualified pool (47 attorneys) consisted of 20 “experts” and 27 “specialists” selected from over 150 applicants. These positions are distributed throughout field appellate and headquarters organizations to assure an experience base of military justice practitioners in key military justice positions, such as appellate defense and appellate government division directors, and some Regional Legal Services Office commanders.

Not part of the Navy program, the Marine Corps has 22 positions coded for individuals with advanced degrees (Master of Laws--LL.M.) in criminal law. The advanced degree is preferred for individuals in the coded positions (e.g., Chief Defense Counsel, Senior Trial Counsel, and Defense Counsel), but exceptions may be approved based on other relevant qualifications.

### **I. Reserve Component**

Complementing the Military Justice Litigation Career Track program is a new Navy Reserve Component Judge Advocate General construct developed in June 2009. Under this construct, expertise is aligned into three “pillars of practice:”

- military justice litigation;
- commander services and legal assistance; and
- specialty practices in international, environmental and admiralty law.

The military justice litigation pillar includes trial and defense counsel, appellate practice and litigation-related positions (e.g., the commanding officer and executive officer at a Region Legal Service Office). This pillar is designed to support the appellate divisions and help ensure qualified judge advocates are available to backfill field units when operational deployments impact the units. The Court (Code 51), and the Appellate Defense and Appellate Government Divisions (Codes 45 and 46), all depend heavily on Reserve judge advocates to fulfill their missions.

### **m. Military Justice Oversight Council**

The Navy JAG chairs the Military Justice Oversight Council, established in 2009. The council currently meets monthly to review case management overall, and post-trial processing specifically. The Marine Corps SJA is a member, as are several senior Navy leaders involved in managing courts-martial matters.

All cases exceeding *Moreno* standards are individually briefed, as is each case without a decision after 6 months or more in the Court. The Council focuses on ensuring proper resources and procedures are in place and working. Once individual cases are completed, “lessons learned” from the case may be briefed to the Council. The Military Justice Oversight Council represents the first time the Navy JAG has been involved in reviewing military justice matters on a recurring basis, or assumed an active role in military justice oversight and supervision.

#### **n. Inspections**

**Navy:** There has been a JAG IG position for at least the last 2 decades with JAG IG inspection teams examining individual field units every 3 to 4 years. In 2006, the field portion of the JAG IG inspection program was revamped as a one-man-interview-based review without any detailed inspection of military justice processes, records, performance, or metrics. The redesigned field inspection system, which was coupled with other elements and intended to be more rigorous overall, did not achieve the desired results. CMTIS system limitations, including missing and inaccurate information, coupled with no longer using subject-matter experts in inspecting field military justice functions, undermined effectiveness in the inspection system.

In explaining the 2006 change, the Navy JAG said he re-structured the inspections program in his previous position commanding the Naval Legal Service Command because the inspection had become a “joke.” The JAG IG could not complete in-depth inspections at every site every year, and people simply prepared for an infrequent inspection, “got things” in order, and knew they could “slack off” for the next few years. The inspections did not develop sustained good performance and were generally ineffective.

The Navy JAG changed the focus to a “more stepped and cumulative approach” with Article 6 visits, JAG IG visits, CMTIS metrics, and command oversight. According to the Navy JAG, however, the CMTIS piece did not materialize and the case visibility he counted on is still missing.

The Navy JAG emphasized a commitment to improving the inspection program. In June 2010, he announced future JAG IG inspections will again be team efforts with military justice experts embedded. In addition, he indicated he authorized hiring a clerk for administrative duties so the JAG IG could focus on substantive responsibilities.

The inspections now include fleet (independent) staff judge advocates, an initiative begun in 2009, and focus exclusively on military justice. The new inspection requirements will be formalized in Navy JAG policy.

**Marine Corps:** Major General Ary, the Marine Corps SJA, is working to standardize field processes and instill greater rigor in legal practice. He drafted a Legal Services and Administration functional area checklist for incorporation in the Commanding General's Inspection Program. Under this program, to improve commander oversight, subject matter experts will inspect Marine Corps Law Centers and Legal Service Support Sections to ensure compliance with standards and processing times.

The new checklist, formally published on June 3, 2010, focuses on standards and adherence, and will be applied to inspected units. These Inspector General inspections, coupled with the more rigorous Article 6 inspections General Ary has implemented, should help improve field legal services in the Marine Corps. According to Major General Ary, while past practice relied on trust, his approach is “trust, but verify” through inspection.

#### **o. Authorized Staffing**

Some case backlog and delay problems in both the Navy and Marine Corps related to inadequate staffing authorizations at both field and appellate levels.

**Navy:** A 2008 Center for Naval Analyses study determined the Navy could be at risk from maintaining a “status quo manpower option,” even with a declining military justice caseload.<sup>25</sup> In assessing risks and costs, the study concluded:

- “modest to significant stress” was evident in the Region Legal Service Office commands and was “especially acute” in field commands that were “operational or joint;” and
- very long work weeks indicated a need for sizable increases in “manpower” to manage the expected workload.

According to the study, the status quo represented a “great deal of risk to the Navy” and, if selected as the “manning standard,” the Judge Advocate General Corps was “undermanned.”

The Assistant Judge Advocate General, Director of Operations (Code 06), advised us the Program Objective Memorandum (POM) 12 (January 4, 2010) indicates a likely reduction for FY 2012, due to concerns about a disproportionately large support-to-operational-personnel ratio. The Navy JAG also anticipates reduced authorizations and/or inventory, and has already been directed to reduce end-strength from the current 841 judge advocates to the 777 judge advocates authorized for the end of FY 2011.

The Navy is still recovering from a legalman shortage, which drove a decision to enhance legalman training to a paralegal-equivalent.<sup>26</sup> This enhanced training will enable legalmen to perform more legal tasks, relieving judge advocates from duties not requiring an attorney. The change, however, does not alleviate inadequate staffing concerns.

Another concern is an increase in “uncompensated” assignments, or the demand for judge advocates to fill duty billets for which there are no corresponding authorizations, such as requirements for joint-duty judge advocates. Judge advocate authorizations are declining, yet the Navy JAG must maintain higher personnel inventories to meet increasing individual augmentee and other duty demands.

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<sup>25</sup> We note the RLSO in San Diego reported its active caseload quadrupled after August 2008, and the high level continued through 2009. The increase may have resulted from Defense Base Closure and Realignment Commission realignments or a changing disciplinary trend.

<sup>26</sup> Legalman (LN), a Navy Enlisted Rating (Job) Description, denotes a paralegal with knowledge and expertise qualifying them to do perform some legal work under an attorney’s supervision.

**Marine Corps:** In late 2007, the Marine Corps SJA proposed several increases in judge advocate structure to address a structural deficit and the increased requirements resulting from end-strength increases and emerging requirements. As a result, the judge advocate structure was increased and positions were “re-coded.”

In 2008, positions historically held by judge advocates, but not coded as such, were re-coded as judge advocate billets. Between 2008 and 2010, the Marine Corps' Total Force Structure Division validated requests to recode approximately 56 judge advocate positions requiring specialized training and education (Master of Laws degree) in certain legal areas, including military justice. These positions were also prioritized for 100 percent staffing to eliminate personnel gaps in critical areas.

A secondary effect of recoding positions to require a Master of Laws degree was to increase opportunities for judge advocates to receive advanced education, which should elevate legal practice throughout the Marine Corps. Fifty one validated positions had been approved for re-coding as of June 4, 2010, and 56 positions will be coded for specialties by 2014.

To increase judge advocate inventories, Marine Corps Recruiting Command increased targeted judge advocate hires 71 percent between FY 2008 and FY 2010. The increase was from 35 in FY 2008, to 45 in FY 2009, and 60 in FY 2010.

In July 2009, due to force structure increases, the O-4 (major) judge advocate inventory fell to 71 percent of the Grade Adjusted Recapitulation.<sup>27</sup> To address this deficiency, the Marine Corps conducted a Return to Active Duty Board, selecting six reserve judge advocates to return to active duty. This initiative gave the Marine Corps additional experienced mid-level leaders with both military and civilian legal expertise. MARADMIN 296/10 was released on May 24, 2010, announcing the Fall 2010 Return to Active Duty Board.

The Marine Corps Judge Advocate Division calculated the following actual and projected staffing required to fulfill Marine Corps requirements for legal services. These levels, which are less than the Grade Adjusted Recapitulation (optimal strength) levels, reflect year-to-year increases between FY 2008 and FY 2012.

#### **Marine Corps Judge Advocates Judge Advocate Staffing to Meet Requirements**

FY 2008: 393  
FY 2009: 411  
FY 2010: 432  
FY 2011: 448  
FY 2012: 460

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<sup>20</sup> According to Marine Corps Order (MCO) 1300.31A, “Enlisted Classification and Assignment Documents,” March 3, 1992 :

“c. Grade Adjusted Recapitulation . . . reflects total Marine Corps manpower requirements by rank and PMOS [primary military occupational specialty] as of the end of the projected fiscal year. . . .”

Overall, the Marine Corps initiatives should help alleviate resource strains experienced in recent years.

**p. Judge Advocate Promotions - Precept Language**

After the first Gulf War, operational law positions became the positions of choice and the path to career success. The 2005 *Sea Enterprise* Panel on the Trial Judiciary concluded "[t]here is an undeniable perception that the judiciary is not a career enhancing assignment for Navy judge advocates." Promotion board statistics revealed few officers serving as military judges when promotion boards convened were selected for promotion. Selection to flag rank was virtually foreclosed to those in careers focusing on military justice.

Developing and maintaining increasingly technical litigation skills requires advanced education and progressive assignment to trial litigation positions, a reality likely to limit opportunities for assignment to sea duty and reduce assignment variety during a career. Under the traditional paradigm for promotion, such a career was not perceived as upwardly mobile.

A key consideration in developing the Military Justice Litigation Career Track program was the need to ensure an equitable promotion rate for those choosing to "specialize" in military justice, rather than remain more general "Fleet" practitioners. If litigators continued not being promoted - career track or not - promising attorneys would continue diverting to other practice areas in the Judge Advocate General Corps, or separating from the Navy to pursue civilian litigation careers. Therefore, one important element in the Military Justice Litigation Career Track program was including promotion board "precept language" explaining the need to ensure sufficient military justice practitioner promotions into higher grades to maintain an experience base and assure continuity in this core functional area.

The Marine Corps uses special precept language to advise promotion boards when a "critical shortage" (below 85 percent) occurs in a specified career field. The language may be used in O-5 (lieutenant colonel) and O-6 (colonel) promotion boards to highlight a shortage in the judge advocate specialty and assist in assuring an adequate number of judge advocates are promoted to the O-5 and O-6 grades.

Appendix O includes further information on Navy and Marine Corps precept language, usage, and results.

**q. Overall Performance Measures**

The Court provided a report based on CMTIS data showing the appellate cases resolved between January 1, 2009, and April 15, 2010 (16½ months). Only about 27 percent (266 of 980 records) had convening authority action dates and in about half these cases, the convening authority action date predated the trial data, indicating data input errors. Similarly, in about 9 percent of the total cases (87 of 980 records), the Court decision/resolution date predated the trial date, again indicating data input errors. After excluding cases with apparent data inaccuracies, our efforts to determine current compliance with the Moreno standards are shown in the table below.



**Navy and Marine Corps Court of Criminal Appeals  
Cases Resolved 1/1/2009 - 4/15/2010**

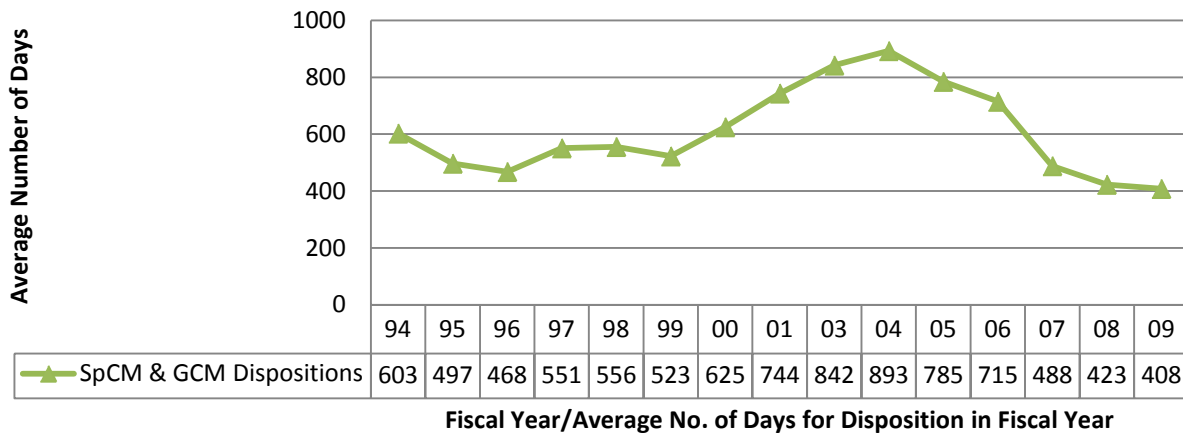
	<b>Records</b>	
	<b>No.</b>	<b>%</b>
<b>Total Records</b>	980	100.0%
Records with Trial Dates	935	95.4%
Records with Convening Authority Action Dates	266	27.1%
Records with Court Docket Dates	980	100.0%
Records with Court Decision/Opinion Dates	980	100.0%
<b>Moreno Compliance--120 Day Standard (Trial to Convening Authority Action)</b>		
Records Used to Measure Compliance	134	
Records Meeting Standard	23	17.2%
<b>Moreno Compliance--30 Day Standard (Convening Authority Action to Docket)</b>		
Records Used to Measure Compliance	273	
Records Meeting Standard	2	0.7%
<b>Moreno Compliance--18 Month Standard (Court Docket to Decision)</b>		
Records Used to Measure Compliance	980	
Records Meeting Standard	980	100.0%
<b>Moreno Compliance-- First Two Standards Combined (Trial to Court Docket)</b>		
Records Used to Measure Compliance	935	
Records Meeting Combined 150 Days Standard	446	47.7%
<b>Moreno Compliance-- Three Standards Combined (Trial to Court Decision)</b>		
Records Used to Measure Compliance	848	
Records Meeting Combined 690 Days Standard*	771	90.9%

\* 120 days + 30 days + 18 months at 30 days per month

As can be seen above, the Court now appears to be doing well in meeting the 18-month *Moreno* timeline (100 percent compliance). Although field units still are not doing well in meeting their individual *Moreno* time standards for completing convening authority actions within 120 days, and ensuring the appeals are forwarded and docketed with the Court in another 30 days, overall, they meet the combined standard (150 days from trial date to docket date) in about 48 percent of the cases. The Court's timeliness then enables about 91 percent of cases to meet the combined, overall *Moreno* time standards (690 Days from trial to decision).

The following graph shows the overall improvement in this area over time between fiscal years 1994 and 2009.

## Average Disposition Time from Trial to Appellate Court Decision Navy and Marine Corps



The improvements beginning in FY 2005 and continuing through FY 2009 appear to be continuing.

The most telling indicator of how effectively the Navy and Marine Corps have addressed their longstanding post-trial delay problems is their current and future performance, which we attempted to assess based on compliance with time standards established in *Moreno* and the other limited statistical data available. The greater test will be their ability to sustain timely performance over the long-term, something we believe they can achieve from developing and institutionalizing appropriate standards, processes, case processing and tracking systems, and comprehensive inspections examining process utilization and effectiveness. Continuing active leadership involvement, supervision and monitoring at all levels will be essential to ensuring attention remains focused on post-trial review objectives and assuring timely, good-quality military justice administration overall.

### 3. Discussion

The Navy and Marine Corps have many good initiatives underway to address their post-trial problems. Existing statistical measures, although limited, demonstrate improvement in all areas --reduced processing times and speedier reviews are apparent. Assisted with declining caseloads and staffing surges from about 2004 to 2008, the immense case backlog has been eliminated. Current staffing in the appellate divisions and Court appears sufficient, with current caseloads, to maintain timely processing.

The Navy JAG's expressed commitment, following the O'Toole report, to continue reviewing annually the state of military justice in the Navy will be essential to ensuring effectiveness in existing and new processes/programs. The Military Justice Oversight Council, which the Navy JAG chairs, is an important step in establishing the higher-headquarters supervisory review and oversight that have been lacking historically.

Current leadership in the Assistant Judge Advocate General for Military Justice Division (Code 02), NAMARA, and the Court initiated many changes to improve their practices and attempt to develop effective tracking and other mechanisms to have case visibility they could not attain through CMTIS. Some staff members are particularly savvy about technology and have contributed to advancing the state of military justice administration through case automation and management.

Civilianizing the Deputy Director positions in the appellate divisions was a prudent decision helping to assure badly needed continuity and expertise in these offices. The individuals in the positions will be critical in managing workload and staff, identifying caseload surge indicators, and securing resources and support to prevent backlogs as have repeatedly besieged the offices in the past. It will be particularly important for the Assistant Judge Advocate General for Military Justice (Code 02) and the Navy JAG to respond to surge support needs when required.

Maintaining strong, experienced Reserve support units for those divisions and the Court is paramount. They could not accomplish their day-to-day mission without substantial and experienced Reserve support. Assignment selection policies should be tailored to assure a ready Reserve resource. When caseload increases, additional Reserve assignments should be considered first, since additional active duty assignments can take 6-12 months, which likely would be too late to meet an immediate need. Reserve resources will also be important in backfilling field military justice positions vacated due to deployments and individual augmentee requirements.

The new Chief Judge of the Navy position is a significant achievement, which should improve quality and performance in both the Trial and Appellate Judiciary. The new Judicial Screening Board process is also particularly noteworthy and should substantially enhance the Court's competence and credibility, eliminating past difficulties with appellate judge temperaments or backgrounds not suited to the position.

The Chief Judge of the Navy has supervisory authority over all Judiciary personnel and provides a unified voice and senior advocate for the community's needs. The new position consolidates responsibility and authority for professional supervision in a single office, achieving a needed focus and judicial competence heretofore missing. Coupled with efforts to establish a litigation career track and restore promotion opportunities for career litigators, the Chief Judge of the Navy should energize and motivate more judge advocates to pursue, not shun, military justice assignments. The new position should also increase the depth and breadth of military justice experience in the Judge Advocate General Corps, with improved field unit and military justice administration performance as one objective.

The first-ever Court publication (JAGINST 5814.1, "Navy-Marine Corps Court of Criminal Appeals," August 3, 2009), new "Rules of Practice and Procedure Including Internal Operating Procedures" (effective February 1, 2010), and improved internal case management procedures, are all much needed policy standardization and process improvements. The tracking systems and increased supervision incorporate some tools necessary for managing the caseload and identifying individual cases requiring priority review. The much more rigorous judicial selection process will, if sustained, help prevent the problems witnessed in the *Foster* case.

### **a. Case Tracking and Management**

Automated tracking systems have a long and troubled history in the Navy JAG. Although progress has been made since 2006, effective and timely case tracking remains an elusive objective. As recently as June 2010, the Navy and Marine Corps were still finding “lost” cases, which still must work their way through the appellate process. This situation will likely continue in the foreseeable future.

A single court-martial tracking system should be the desired goal for the Navy and Marine Corps. If the ongoing Center for Naval Analyses study can be adjusted to include the coverage, a comprehensive study is needed to define a truly functional case management-focused tracking system to address the myriad of user data and reporting needs from field through appellate court levels in both the Navy and Marine Corps.

Additionally, the integrated case management solutions available in the Federal courts' Case Management / Electronic Case Filing (CM/ECF) system should be considered. This system appears to offer an off-the-shelf technology adaptable to military requirements, and has universal interest across the Service courts of criminal appeals and the Court of Appeals for the Armed Forces. The proponents include active duty, civilian, and Reserve military justice practitioners, many of whom have first-hand experience with these systems in their civilian practices. Funding and other commitment/issues, however, have stymied efforts to seriously examine the system's utility.

We understand the ongoing Center for Naval Analyses study is including this system in benchmarking efforts. We encourage a detailed review of this system's adaptability/feasibility. The review should include military justice practitioners who understand the technology, know system capabilities, and are familiar with Service requirements.

Significant, dedicated funding will be necessary to develop and implement the courts-martial case processing and tracking system the Navy needs to address the inadequate automation and case tracking that caused lost visibility over appellate cases and resulting delays in administering military justice. The current, outdated reliance on paper production and transmission is laborious, costly, and produces untimely results.

### **b. Process Responsibility**

Another significant issue is inadequate post-trial process uniformity in Navy and Marine Corps field units. Despite uniform organizational structures, Navy RLSOs each operate differently with distinct processes and without any uniform organizational alignment to control case processing. The O'Toole report noted inconsistent post-trial processing structures across the RLSOs, which our review confirmed. The same situation exists in the Marine Corps.

Another significant concern is inadequate standardization in procedures, checklists and templates for case processing in both the Navy and Marine Corps. Navy and Marine Corps field units use distinctly different, unit-developed standard operating procedures for case processing, without standardization across either Navy or Marine Corps units. Additionally, although CMTIS is the central case tracking system in the Navy, the RLSOs each maintain internal case tracking systems because CMTIS does not meet their overall needs.

The Marine Corps has achieved some recent progress in standardizing the case tracking function. The new Marine Corps CMS fielded in February 2010 appears to be gaining confidence. The two units we visited now both use the Marine Corps CMS exclusively for case tracking and reporting.

The information technology section responsible for managing the Marine Corps CMS has been conducting field training and developing upgrades and changes in response to field information requirements. Although CMS is still not a comprehensive data and time tracking system, the Marine Corps is making progress in this area.

In the Navy, two key regulations outlining detailed management goals and checklists for case processing have not been used for years. In fact, the management goals directive was rescinded without replacement. The only remaining time goals are those imposed in *Moreno*, after many court warnings, which followed noncompliance with published time and processing standards that became unused due to inadequate enforcement and interest.

Published standards and directives defining procedures, goals and expectations for individual processes are fundamental to any system's health and rigor. Standards are the means by which effective systems and processes endure and perform properly over time despite personnel turnover, organizational change, and deployment turmoil. They assure process continuity and reduce error opportunities.

Our interviews revealed significant process deficiencies in the field. Although improved since *Moreno*, continuing errors and delays appear to result primarily from lacking uniform, institutionalized processes and standards.

The current focus on *Moreno* compliance to avoid post-trial delays is good, but should not be the sole process and time management focus in military justice. Many pre-trial, trial, and post-trial processes require detailed attention and rigor. If not monitored and accomplished properly, any process can jeopardize case viability, or cause a lengthy, unnecessary delay.

Some individuals we interviewed described the historical cultural paradigm in the Navy as a hands-off, reactive approach to business, not a proactive or preventive approach. In recent years, there has been a more concerted effort to tackle process issues more aggressively. However, in our review, we found that oral discussions, informal documents, e-mails or telephonic communications were often the media of choice to announce changes, without follow-on institutionalization in more enduring formats. While these type communications are helpful when immediate action is needed, they should not substitute for formalizing policy in departmental regulations or instructions. We also found a tendency to use aspirational language, rather than create concrete standards. For example, a division recommendation to identify the specific *Moreno* time standards in a draft Naval Legal Service Command instruction was deemed unnecessary. The current language simply exhorts timely processing. Although such language is good, we believe it is not sufficient to motivate the thousands of people in the large and dispersed Navy and Marine Corps organizations to perform to a desired, but unspecified standard.

This year's annual review of Navy military justice administration, which Captain O'Toole is again heading, offers an opportunity to address this issue further. Because the Navy JAG is responsible for military justice administration in both the Navy and Marine Corps, the upcoming and future reviews should include Marine Corps military justice administration in the coverage.

### **c. Supervision and Oversight**

This area has improved since the current Navy JAG began the Military Justice Oversight Council, and the Naval Legal Service Command gained current visibility over cases pending in the field. However, few oversight or supervisory mechanisms are embodied in official policy or institutionalized processes, and the decentralized Navy and Marine Corps organizations have little intermediate or higher headquarters oversight capability except at the Navy JAG, Marine Corps SJA, and Naval Legal Service Command levels.

Prior to CMTIS, field activity performance could not be monitored and totally depended on individual staff judge advocate experience and military justice focus. In establishing the Military Justice Oversight Council, the current Navy JAG created the first senior-level oversight mechanism for military justice we found in the Navy; however, that Council could be terminated at any time and successor Navy JAGs might choose not to continue the current commitment to military justice oversight.

Anticipating such an occurrence, the current Navy JAG began revising a SECNAV instruction to include provisions formally establishing the council. The draft instruction, which is still in review, requires annual Navy JAG reports to the Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps.

In addition, the Region Legal Service Offices are now aligned to provide greater oversight and quality assurance for post-trial processing, at least for the ashore legal entities they supervise. However, they do not have supervisory or administrative control over the remaining independent staff judge advocates, who are totally autonomous in administering military justice and may vary greatly in experience and expertise.

### **d. Inspections**

The Marine Corps recently instituted a comprehensive Commanding General IG inspection process, but the Navy retreated from more rigorous military justice inspections, believing its Naval Legal Service Command monitoring (based on CMTIS and other data), in conjunction with the Article 6 and more limited IG inspections, would be a sufficient tool. That belief was not fulfilled.

Just as establishing definitive standards is essential to developing sound processes, requiring recurring, detailed inspections to assess processes and procedures is essential to determining effectiveness. Inspections, with subsequent accountability for performance, help organizational leaders ensure processes are good, are actually used, and function as intended. In a recent closeout meeting, the Navy JAG acknowledged the current system had not met expectations and subsequently announced plans to revise the inspection program.

### **e. Convening Authorities**

The sheer number of convening authorities in the Navy and their geographic dispersal creates unique military justice administration and logistics issues. For example, the legal personnel available to support many convening authorities have limited experience, which has contributed to errors in handling military justice matters. Modifications that simplify and streamline the current structure and subject independent afloat legal personnel to administrative control would substantially improve the post-trial process.

### **f. Authorized Staffing**

Although we generally found current appellate division staffing adequate for current caseloads, some data suggests field staffing authorizations for both the Navy and Marine Corps may be inadequate. A 2008 Center for Naval Analyses study identified various “stressors” on personnel resulting from excessive workloads. The Marine Corps reported identical challenges and difficulties. Deployments and increased judge advocate requirements for which authorizations do not exist have imposed additional stress. The upcoming Section 506 panel review will have an opportunity to examine this area in greater detail.

### **g. Marine Corps SJA**

Through statute and Secretary of the Navy instruction, the Navy JAG is responsible for military justice matters in the Marine Corps. In reality, however, neither the current nor previous Navy JAGs have generally exercised this responsibility vis à vis the Marine Corps, as evidenced by the longstanding post-trial delay problems. The operating paradigm has been to “trust” the Marine Corps to manage issues, in effect ceding responsibility without granting corresponding authority. Whether this situation resulted from respect for the Marine Corps’ autonomy, or was a default result from overall time consuming demands on the Navy JAG, it produced a leadership vacuum in the Marine Corps.

In most routine matters, the Navy JAG advises, supports, and communicates with the Commandant of the Marine Corps through the Marine Corps SJA. Effective communication and interaction between the Navy JAG and Marine Corps SJA over the years seem to have depended primarily on their personal relationship, not any obligation involved in the respective positions. The current relationship between the two officers is direct and unimpeded, which has significantly benefited the efforts in recent years to resolve case backlogs and gain visibility over courts-martial cases.

The Marine Corps SJA does not have departmental responsibilities and supervises only those functions and personnel assigned to the Judge Advocate Division, Headquarters, Marine Corps. His role is advisory at the headquarters level, except as the Secretary of the Navy, the Navy JAG, or the Commandant of the Marine Corps may otherwise direct. From an overall perspective:

- Marine Corps field legal organizations do not have any supervisory legal organization monitoring their activities. They function totally autonomously.
- The Marine Corps SJA serves as the occupational field sponsor for judge advocates, legal services officers, and enlisted members, but does not have supervisory authority over these personnel. This authority remains within the non-JAG chain of command.

- The Navy JAG, by statute, holds exclusive authority to certify judge advocates as competent to perform duties as trial and defense counsel.
- The Marine Corps SJA is not authorized to conduct Article 6 inspections, or exercise professional supervision over legal services delivered in the Marine Corps.
- Not having field supervisory authority impacts the Marine Corps SJA's stature as the military legal community's leader in the Marine Corps. Recent legislation increasing the Marine Corps SJA's grade to Major General suggests some intent for the position to have greater leadership and supervisory responsibilities.
- The operations tempo and heavy demand for legal services in all disciplines has expanded the requirements for judge advocate functions in all Services. In this operational environment, the Navy JAG must rely on the Marine Corps SJA to exercise functional supervision and leadership in the Marine Corps judge advocate community, either on the Navy JAG's behalf or under direct authority that must be created.
- In most military organizations, a commander's staff judge advocate has direct and unimpeded access to the commanding officer, which assures access and independence in the legal advice rendered. Similarly, under statute, staff judge advocates and legal officers have the right to direct communication with convening authorities in all matters concerning military justice. The Marine Corps SJA position is two organizational levels below the Commandant. The Marine Corps SJA must pass through both the Director for the Marine Corps Staff and the Assistant Commandant before gaining access to the Commandant. In contrast, the Marine Corps SJA's civilian counterpart, the Counsel for the Commandant, is a direct report to the Commandant and has direct access. In military justice matters, it is essential for a commander's legal advisor to have unfettered access.

Consideration should be given to enhancing the Marine Corps SJA's authority to exercise more direct and effective professional supervision over Marine judge advocates and the legal services they deliver. We understand the Navy is considering this matter and reviewing a new draft SECNAV instruction, which among other things will address the Marine Corps SJA authorities and responsibilities. This draft was in the Navy General Counsel's office for review when we completed our field work.

## V. CONCLUSIONS

Military Justice is the primary statutory mission for judge advocates. Other missions and practices evolved over time, but no other function is so inextricably linked to a commander's responsibility for maintaining a well-disciplined force. Although commanders own the military justice system and are the decision-makers, judge advocates administer and supervise the system. They bear a special responsibility for assuring the justice system is administered fairly and efficiently, and for diligently representing the interests of both the commander and the accused.

Our charge and principal focus was on reviewing the systems, policies and procedures used, and determining whether the resources devoted to military justice administration were adequate to assure appellants their due process rights as required under the U.S. Constitution, the Uniform Code of Military Justice, and applicable case law. Overall, we found significant improvements. Many good initiatives had been initiated, were under development, or were in planning.



However, some concerns remain that could preclude enduring reform if not addressed appropriately.

Over time, the Navy and Marine Corps judge advocate communities lost sight of their core mission. There was a consistent failure in leadership and inadequate institutional vigilance, supervision and oversight at all organizational levels involved in administering military justice. The failures also represented a deviation from fundamental principles of professional responsibility, which require diligence, competence and timely representation of clients' interests in the criminal justice system.

The highly decentralized Navy and Marine Corps organizations do not have intermediate supervisory staff judge advocate or command levels in most cases. As a result, effectiveness in any given unit continues to be, in many respects, ad hoc and dependent on the personality, work ethic, aggressiveness, and interest of individual supervisors and staff judge advocates. Current Naval Legal Service Command monitoring has had a beneficial effect.

Historically, institutionalized policy, standardization, and supervisory oversight could have ensured more effective military justice administration and prevented post-trial delay problems. Automated tracking systems either did not exist, did not provide needed visibility, or were ineffective in affording the visibility over cases needed for effective supervision. Inspections, where they existed, were ineffective in identifying process deficiencies, or eliciting sufficient corrective action. Time processing guidelines were not enforced or did not exist. Assignment policies for the Court and appellate divisions adversely impacted quality and continuity. Compounding the supervision and process deficiencies, dramatically increased deployments and individual augmentee requirements after 1991 created both turmoil and understaffing in post-trial functions.

In meetings, the Navy JAG, Vice Admiral James Houck, and the Marine Corps SJA, Major General Vaughn Ary, candidly assessed the post-trial delay problems triggering this review. In their words, there was a culture shift away from military justice to operational law, most significantly during Gulf War I and thereafter. They are implementing many initiatives to address outstanding issues, in addition to numerous initiatives dating to about 2005, which are now in force. As Major General Ary commented, they must set standards, train to standards, and inspect to standards.

## VI. **RECOMMENDATIONS**

1. We recommend the Department of the Navy develop and field a single Navy and Marine Corps military justice case processing and tracking system that satisfies user requirements and achieves system-wide visibility over the entire court-martial process, including capability for an accused to monitor his/her appellate case status directly through web access. Continuing the current in-house efforts cannot be expected to resolve the problems experienced over the last two decades.

**Management Comments:** Management comments on recommendations in the draft report are summarized and discussed below, and are included verbatim in Section VII below.

The DON concurred with recommendations 1 and 2 in the draft report, which have been consolidated into Recommendation 1 above. The DON advised:

(1) The Navy JAG is committed to developing a fully integrated DON military justice case processing and tracking system, a priority reflected in JAG Guidance 2010 (December 2009). The ultimate system objective must be accurate case tracking through all DON military justice processes to ensure timely mission accomplishment, and each accused Marine or Sailor receives due process.

(2) While this tracking system is being developed, current systems accurately track cases—CMTIS, augmented with manual back-up checks, is a functional, real-time case tracking capability for Navy cases, and the Marine Corps CMS, a single, mandated Corps-wide tracking system, provides all the visibility necessary for headquarters-level supervision and also provides an "accounts receivable" to the NMCCA for all Marine cases requiring appellate review.

(3) In March 2010, the Navy JAG (with concurrences from the DON Chief Information Officer, the DON Next Generation Enterprise Network System Program Office, and the DON Assistant for Administration) initiated a Center for Naval Analyses study to examine current Navy and Marine Corps case tracking systems, and also benchmark against the Federal Court's Case Management and Electronic Case Filing (CM/ECF) system and the Army and Air Force systems. The study, which is due in February 2011, will assist in identifying possible options for a unified Navy and Marine Corps system, and may provide a basis for a DoD-wide system.

(4) The Navy and Marine Corps have instituted numerous IT system improvements to monitor case tracking, but there is room for improvement. For example:

- Electronic Court Case Files: Most state and federal court systems are moving to full electronic/digital court records. Electronic records comply with the Paperwork Reduction Act, speed process delivery, and automate functions.

    > Access to Data: A single, complete data entry, storage and retrieval system incorporating all criminal incident information across the Navy and Marine Corps would meet all current and future reporting requirements, and enable criminal activity statistical trend analysis.

- Case Management: There is a need to enable end user (investigators, counsel, support personnel) to quickly and effectively generate materials for courts-martial processing based on underlying system data (e.g. auto populated forms) and effectively distribute and document court compliance practices electronically to reduce manpower and improve efficiency.

- > Workload analysis: An IT system to effectively manage legal offices, including managing personnel workload, identifying performance trends, streamlining internal

processes and evaluating manpower requirements, is standard practice in the private sector.

The DON will continue pursuing an integrated Navy and Marine Corps system. An integrated DoD system could be a more optimum long term solution.

**Our Response:** The management comments are responsive. They also acknowledge that current visibility over cases does not derive solely from the current automated systems, which must be augmented with “manual back-up checks.” As discussed in the report, at the time of our field work, Navy field units were submitting weekly reports so the Naval Legal Service Command could assess compliance with *Moreno* standards. CMTIS reports were not reliable for that purpose and had to be supplemented. As also discussed in the report, even though visibility over cases improved both before and during our review, the improved case visibility did not prevent surprise when other old cases (*Bartolo, Bolla, Stagner, Thibodeau, and Brock*) surfaced during our review. Although we believe similar surprises are not as likely in the future, the possibility cannot be ruled out and should not be ignored.

2. We recommend the Secretary of the Navy issue policy establishing uniform post-trial processing standards, procedures, time guidelines and process responsibilities for the Navy and Marine Corps. Although our review focused on post-trial processing, more detailed process standards should be established for the entire court-martial process and should be institutionalized in Service policy.

**Management Comments:** The DON concurred, advising:

(1) JAGINST 5814.1A requires the Commander, Naval Legal Service Command and Marine Corps SJA to institutionalize post-trial processes working successfully in the respective Service environments;

(2) the Marine Corps SJA has initiated standard post-trial processes in the Marine Corps, including a standard post-trial Staff Judge Advocate Review letter and standard Convening Authority's Action form;

(3) the Marine Corps SJA is reviewing other Marine Corps standards and local standard operating procedures for consolidation and development into Marine Corps-wide post-trial processes and standards; and

(4) under Commanding General Inspection Program purview, the Marine Corps recently implemented a new standard 16-page checklist addressing staff judge advocate offices, Legal Service Support Sections, and Law Centers, giving Commanders the ability to measure performance and hold legal professionals accountable.

**Our Response:** The management comments are responsive, assuming, JAGINST 5814.1A, currently in staffing within the Navy, establishes, “uniform post-trial processing standards, procedures, time guidelines and process responsibilities for the Navy and Marine Corps.”

3. We recommend the Secretary of the Navy, or the Judge Advocate General of the Navy if so empowered, extend authority for the Navy Region Legal Service Offices and Naval Legal Service Command to supervise and direct timely and accurate post-trial processing by Navy independent (afloat) staff judge advocates. Independent staff judge advocates currently do not have a supervisory legal organization to which they answer for post-trial processing, either for specific issues or for military justice administration overall.

**Management Comments:** The DON concurred that the Commander, Naval Legal Service Command and Region Legal Service Offices should supervise and direct timely and accurate post-trial processing, but nonconcurred that independent staff judge advocates' currently do not have a supervisory legal organization to which they answer for post-trial processing. According to the comments,

*“As reflected on page 89 of the DoDIG report, in 2005, the JAG directed Region Legal Service Offices (RLSO) and Naval Legal Service Command (NLSC) to supervise and direct timely and accurate post-trial processing by all commands in their areas of operation, including Navy independent and afloat staff judge advocates (SJAs),” and*

*“. . . Navy convening authorities and their independent SJAs rely on the advice and guidance of the cognizant RLSC.”*

**Our Response:** These comments do not address the central issue, i.e., there is no legal organization with authority to direct or supervise the independent staff judge advocates in post-trial processing matters. As clarification, on page 89 of the draft report, we noted that in 2005, the Navy JAG directed the new Region Legal Service Offices to “track and retain control over records of trial until convening authority actions were completed and the records were received by NAMARA.” Tracking and retaining control over records of trial is different in character and degree from actively supervising and directing timely and accurate post-trial processing by independent SJAs. Further, as demonstrated by information in this report, RLSC efforts and convening authority/independent SJA reliance on advice and guidance of RLSCs historically failed to ensure timely post-trial processing of records of trial and submission to the Court.

4. We recommend the Secretary of the Navy direct a comprehensive review to identify the staffing needed to meet military justice requirements in the Navy and Marine Corps. The review should assess staffing adequacy and mix, and take into account the impact(s) frequent deployments and mandates to fill uncompensated billets have on the ability to complete mission requirements. The review should also assess the potential benefits from civilianizing some officer or enlisted billets to enhance continuity and help assure uninterrupted service in the post-trial process. The ongoing Section 506 panel review provides an opportunity for immediately assessing the needs.

**Management Comments:** The DON concurred, agreeing the Section 506 panel review is an immediate opportunity and advising:

(1) the Navy JAG is providing the Chief of Naval Personnel and cognizant budget submitting offices with a comprehensive Navy JAG staffing needs review;

(2) the Marine Corps SJA is working closely with the Deputy Commandant for Manpower and Reserve Affairs, and the Total Force Structure Division, to assess Marine Corps' manpower needs; and

(3) in accordance with our recommendation, the Navy JAG intends to evaluate the feasibility of civilianizing post-trial review billets in the Region Legal Service Offices and will report the results in the Annual Report on Military Justice within the Department of the Navy, due November 30, 2010.

**Our Response:** The comments are responsive.

5. We recommend the Secretary of the Navy, Commandant of the Marine Corps, and Judge Advocate General of the Navy take appropriate steps to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to:
  - a. exercise professional supervision over Marine judge advocates and the legal services they deliver; and
  - b. conduct Article 6, Uniform Code of Military Justice (UCMJ) inspections in the Marine Corps.

**Management Comments:** The DON concurred, advising:

(1) The Navy JAG and Marine Corps SJA, in coordination with the DON General Counsel, have been directed to revise SECNAVINST 5430.27C to increase Marine Corps SJA responsibility and authority to set and maintain standards for administering military justice and providing uniformed legal services in the Marine Corps. The revision will expressly delegate the Navy JAG's Article 6, UCMJ, inspection responsibilities within the Marine Corps to the Marine Corps SJA.

(2) Legislation will be proposed to establish a direct relationship between the Secretary of the Navy and the Marine Corps SJA to enhance oversight and accountability over the new Marine Corps SJA authority.

(3) A legislative change to 10 U.S.C. §806 will be proposed to make the Marine Corps SJA responsible and accountable for conducting Article 6, UCMJ, inspections in the Marine Corps.

(4) The changes all will be drafted to ensure consistency with the Navy JAG's Title 10 authorities.

**Our Response:** The comments are responsive.

6. We recommend the Judge Advocate General of the Navy establish a joint Navy and Marine Corps task force to review and assess systems such as the Federal Case Management / Electronic Case Filing (CM/ECF) system for possible fielding in the Navy and Marine Corps. The Navy should explore opportunities for including the Army and Air Force in the study, and making such a system a DoD-wide application.

**Management Comments:** The DON concurred, advising that in March 2010, the Navy JAG initiated an IT requirements study in which the Center for Naval Analyses is benchmarking the Federal Court's Case Management and Electronic Case Filing (CM/ECF) system, as well as the Marine Corps, Army, Air Force and Department of Justice systems, to assist in identifying possible options for a unified Navy and Marine Corps system, and potentially commonalities across the DoD. Once recommendations from this study are received, the DON will assess the IT system(s) to pursue. Although DON will continue pursuing an integrated Navy and Marine Corps system, an integrated DoD system may be a more optimum solution. Currently, each Service has its own case tracking system and none has an electronic case filing system. For long-term efficiency across the Services, moving to a unified system could be advantageous. The Navy JAG will make its study results available to the Army and Air Force to evaluate the potential for adopting a common system.

**Our Response:** The management comments are responsive.

7. We recommend the Judge Advocate General of the Navy implement a comprehensive and detailed inspection program for military justice administration in field units and ensure the inspections address processes and tracking systems. Independent (afloat) legal units should be included in the inspection program.

**Management Comments:** The DON concurred, advising:

(1) JAGINST 5040.1, issued on June 14, 2010, updates policy, responsibilities, and procedures for assessing Navy legal offices, including independent SJA offices, staffed with JAG community personnel, and provides for annually inspecting every Region Legal Service Office (RLSO), the Naval Justice School, and selected staff judge advocate offices;

(2) by instruction, a subject matter expert in military justice will participate in every RLSO inspection to assess the RLSO's performance and compliance with statutory and regulatory requirements, including post-trial processing of courts-martial, and also review Naval Legal Service Office (defense and personnel representation functions) performance; and

(3) with respect to the Marine Corps, the draft report details Marine Corps SJA actions to enhance both the Commanding General's Inspection Program and his own Article 6 inspection process, specifically to ensure compliance with standards and processing times. These inspections programs are designed to be complementary.

**Our Response:** The comments are responsive.

8. We recommend the Judge Advocate General of the Navy establish a Chief Defense Counsel or equivalent position in the Navy. The Navy is the only Service without such a position, and the defense community lacks leadership and a community advocate to oversee defense

services and assure proper resources and training are available.

**Management Comments:** The DON concurred, advising that on October 1, 2010, Naval Legal Service Command (NLSC) was reorganized to separate the Naval Legal Service Offices (NLSOs) and Region Legal Service Offices (RLSOs) into two functional groups. This reorganization included eliminating the Vice Commander position, NLSC, and creating a Deputy Commander, RLSOs, and Deputy Commander, NLSOs. Each Deputy Commander has authority and resources to actively manage and supervise courts-martial case processes.

Commander, NLSC, also established both a Defense Counsel Assistance Program (DCAP) and a Trial Counsel Assistance Program (TCAP). The DCAP is led by a Navy captain Military Justice Litigation Career Track officer as its director, who serves in the role of a chief defense counsel of the Navy and reports to Deputy Commander, NLSO. DCAP is separate and distinct from the office of the Judge Advocate General Criminal Law Division (Code 20) and the Appellate Defense Division and will provide “reach-back support” dedicated to specific trial defense counsel needs. DCAP director supervises only personnel detailed to DCAP, but will assist the Deputy Commander, NLSOs, in exercising oversight and reporting responsibilities.

The TCAP is led by a Navy commander Military Justice Litigation Career Track officer, who serves as the chief trial counsel of the Navy, reporting to Deputy Commander, RLSOs. TCAP will provide Government-related subject matter expertise and support to RLSO trial counsel when requested (trial counsel, or Commanding Officer, RLSO) or as the Deputy Commander directs. TCAP Director supervises only personnel detailed to TCAP, but will assist the Deputy Commander, RLSOs, in exercising oversight and reporting responsibilities.

The Marine Corps has had a Chief Defense Counsel since 1985.

**Our Response:** The comments are generally responsive. Realigning NLSC Headquarters and creating new positions and functions with greater focus on the defense community are significant steps forward. The Deputy Commander, NLSOs, has been given the authority and resources to manage and supervise courts-martial defense matters, and will be assisted by the Director, DCAP, who serves in the role of chief defense counsel. However, the senior partner in the Navy’s defense firm, the Deputy Commander, NLSOs, is also responsible for two other major legal programs: legal assistance and claims. We remain concerned that these additional responsibilities will negatively impact the Deputy Commander, NLSOs’ ability to lead, oversee, and resource defense services. We continue to recommend establishing a Chief Defense Counsel position with the authority and resources to manage and supervise the Navy defense function, including the defense counsel and staff.

9. We recommend the Secretary of the Navy initiate a legislative proposal(s) to amend statute as appropriate to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to certify a Marine judge advocate’s competence to perform duties as a trial or defense counsel.

**Management Comments:** The DON agreed that a statutory change is needed to enhance and clarify the Marine Corps SJA’s authority over delivery of professional legal services in the

Marine Corps. However, the DON believes modifying 10 U.S.C. §§ 5041, 5046, 1044, and 806 (to be implemented through revisions to relevant DON and Marine Corps regulations) will best accomplish the needed change and make amendment of Article 27(b) unnecessary.

**Our Response:** The comments are responsive. Although we believe pursuing a direct amendment to Article 27(b), Uniform Code of Military Justice, should continue as an active option during this process, we have modified our original recommendation to eliminate mention of Article 27(b). This modification provides DON greater latitude in pursuing changes needed to enhance and clarify the Marine Corps SJA's authority.

10. We recommend the Judge Advocate General of the Navy provide at least annual military justice updates to the Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps. The updates should detail post-trial processing improvements, *Moreno* compliance, and progress in establishing effective oversight and tracking mechanisms for post-trial processing.

**Management Comments:** The DON concurred with recommendations 7 and 12 in the draft report, which have been consolidated in this recommendation, advising that the Navy JAG already initiated an annual reporting process, with the first annual report compiled in September 2009, and the second due November 30, 2010. According to the comments:

(1) the "Service Chiefs" will provide this annual report to the Secretary of the Navy, thus ensuring adequate Service input and comment to the Secretary;

(2) a proposed Secretary of the Navy instruction currently in coordination would institutionalize the annual reporting requirement; and

(3) the report will be a comprehensive assessment of military justice practice across the DON, including the Marine Corps.

**Our Response:** The comments are responsive.

11. We recommend the Judge Advocate General of the Navy update applicable service policy documents such as the Naval Legal Service Command Manual, the Judge Advocate General Manual, and the Legal Administration Manual to:
  - a. Establish uniform business rules for shipping/transmitting records of trial to the Navy-Marine Corps Appellate Review Activity to assure speedy, positive tracking capability and visibility over records of trial at both field and appellate levels.
  - b. Require the Navy-Marine Corps Appellate Review Activity to send all court "mandates" requiring convening authority action through the servicing field legal offices.
  - c. Require convening authorities, upon completing a court-mandated action, to return the completion documents to the Navy-Marine Corps Appellate Review Activity through the servicing field legal office.



**Management Comments:** The DON concurred, advising:

(1) With respect to shipping/transmitting records of trial, JAGINST 5813.1B, "Standardization of General Courts-Martial and Special Courts-Martial Verbatim and Summarized Records of Trial," September 29, 2010, requires sending all records of trial requiring review under Articles 66 or 69 to the Office of the Judge Advocate General via FEDEX/UPS/DHL/USPS Express, or hand delivery (when feasible and authorized). The Marine Corps is currently conducting a pilot project to test using electronic records of trial. Possible project results include reduced costs and improved post-trial processing timelines, tracking, and service/departmental visibility.

(2) With respect to sending and returning mandates, the Manual of the Judge Advocate General (JAGMAN), Chapter I, has been revised, is currently in coordination, and final promulgation is anticipated in December 2010. Section 0155(c)(I) will be amended to include the following language based on the recommendation and to formalize current practice:

*All supplementary orders that require convening authority action shall be returned to the convening authority via the servicing Region Legal Service Office or area Marine Corps Staff Judge Advocate's office. Additionally, once the court-mandated action is complete, convening authorities shall return the completion documents to the Navy-Marine Corps Appellate Review Activity via the same office.*

The Marine Corps SJA is currently revising the Legal Administration Manual (Marine Corps policy) to reflect these new processes.

**Our Response:** The comments are responsive.

12. We recommend the Judge Advocate General of the Navy monitor and maintain Reserve unit support for the appellate divisions and the Navy-Marine Corps Court of Criminal Appeals to assure sufficient numbers and experience to accomplish missions and meet immediate surge requirements.

**Management Comments:** The DON concurred, advising:

(1) the Navy JAG and Marine Corps SJA monitor Reserve support to these organizations continuously;

(2) separate reserve units support the appellate divisions and NMCCA – currently, 13 Naval Reserve judge advocates support the Appellate Government Division (Code 46); 20 Naval Reserve judge advocates, 1 Reserve Legalman and 5 Marine Corps Reserve judge advocates support the Appellate Defense Division (Code 45); and 10 Naval Reserve appellate judges and two Marine Corps Reserve appellate judges supported the NMCCA;

(3) personnel assignment numbers are monitored through the Military Justice Oversight Council and Service assignment processes (Navy JAG and Marine Corps SJA); and

(4) Marine Corps headquarters (Reserve Legal Services Support Section, Judge Advocate Division) centrally manages (administration, command, and control) Reserve legal services delivery to the Total Force (Marine Corps), and ensures trained and qualified legal personnel are available as directed to support active duty requirements, including requirements at the appellate divisions and NMCCA.

**Our Response:** The comments are responsive.

13. We recommend the Judge Advocate General of the Navy maintain an O-6 grade authorization for, and fill the Director, Appellate Defense Division (Code 45), position at the O-6 level.

**Management Comments:** The DON concurred, advising the JAG Corps recognizes the importance and is committed to maintaining continuity and seniority in the billet, although temporary gaps may be unavoidable given military personnel rotations.

**Our Response:** The comments are responsive.

14. We recommend the Judge Advocate General of the Navy examine effectiveness and utility in the 1-year clerkship program established to enhance appellate counsel training and either modify or rescind the program.

**Management Comments:** The DON concurred, advising:

(1) although the appellate court clerkship program is vital to the NMCCA mission and counsel who serve as law clerks value the experience highly, the Navy JAG is reviewing assignment options to assess the effects of the resulting 2 year (vice 3 year) tours in the appellate divisions arising when an officer is assigned to a 1 year court clerkship prior to arriving at an appellate division; and

(2) the review results will be addressed in the Annual Report on the State of Military Justice within the Department of the Navy.

**Our Response:** The comments are generally responsive. However, we encourage a thorough review that includes an option to increase the duty tour to 4 years and, thereby, eliminate the impact on the appellate divisions.

## VII. MANAGEMENT COMMENTS



THE SECRETARY OF THE NAVY  
WASHINGTON, D. C. 20350-1000

November 5, 2010

### MEMORANDUM FOR DEPARTMENT OF DEFENSE INSPECTOR GENERAL

SUBJECT: Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (Project No. 2009C007)

Per your memorandum of September 24, 2010, the following comments are provided in response to the draft report concerning post-trial processing of courts-martial within the Department of the Navy.

Your report asserts that the Department has failed to ensure that all courts-martial receive timely post-trial review. While I am confident that the vast majority of courts-martial did receive timely post-trial review, there are instances where processes failed. The case of *United States v Foster*, the impetus for this review, is a stark example.

There are many reasons for the failures during this time period: a military justice ethos that produced the largest number of courts-martial within the DoD; the globally dispersed and decentralized nature of Navy and Marine forces, of which the judge advocate communities are a part; significant operational tempo and increasing client demands on judge advocates outside of military justice; and the difficulty of standardizing policies and instituting common operating systems across two mature Services with different organizational constructs. There is also evidence that, in some cases, inattention to detail and substandard professionalism at all levels allowed cases like *Foster* to suffer.

Your draft report states that "[t]he most telling indicator of how effectively the Navy and Marine Corps have addressed their longstanding post-trial delay problems is their current and future performance . . . ." Judged against this standard, I believe the Department of the Navy is meeting its post-trial military justice mission, as demonstrated by the following:

- In 2010, neither the Court of Appeals for the Armed Forces (CAAF), nor the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found any failure of due process in any case because of post-trial delay. In 2009, only the *Foster* case required relief by NMCCA.
- The appellate process has not exceeded the 18-month guideline of the *Moreno* decision in any case this year, and only exceeded that guideline in two cases in 2009. One case was *Foster*; the other case required no corrective action.
- Your report indicates that the average disposition time from trial to appellate court decision in FY 2009 averaged 408 days - less than one-half of the FY 2004 rate - and, in fact, the most expeditious average processing rate since 1994. Our data from FY 2010 shows another record low post-trial processing rate: For cases decided by the NMCCA in FY 2010, the average time from trial to appellate decision declined to 248 days. Even when including remanded cases on which the NMCCA had taken previous action, the average rises to only 323 days.

SUBJECT: Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (Project No. 2009C007)


As your report notes, there has been dramatic improvement in post-trial processing over the course of the last five years and that improvement is being sustained. A succession of Judge Advocates General and others in senior leadership positions focused on post-trial processes to not only correct the deficiencies of past cases, but also establish the institutional structures to ensure compliance into the future.

While I do not discount the possibility of pre-2006 cases having been misrouted for review outside of reliable channels, I believe that both Services and the Navy and Marine Corps Appellate Review Activity are tracking cases such that, today, no courts-martial are going unaccounted for in the post-trial process, and the timeliness of appellate review is well within the guidelines set forth by the Court of Appeals for the Armed Forces.

I have full faith and confidence that the current Judge Advocate General, in partnership with the Staff Judge Advocate to the Commandant, has been fully accomplishing, and will continue to fully accomplish, the post-trial military justice mission as required by statute and regulation. I agree with the Draft Report's conclusion that the improvements of the past five years should be institutionalized, and that there are still important improvements to be made, specifically in standardizing field processes and development of a single, consolidated case tracking system. I look forward to the results of the Judge Advocate General's upcoming review of case tracking and management options, as well as the Annual Report on Military Justice within the Department of the Navy. Finally, I believe the authority and accountability of the Staff Judge Advocate to the Commandant of the Marine Corps should be enhanced within the Marine Corps.

My comments on the draft report's recommendations are provided at TAB A. Additionally, substantive comments of the Judge Advocate General and the Staff Judge Advocate to the Commandant are provided at TABs B and C.

Thank you for your efforts in undertaking this important review, and for affording me the opportunity to provide comment. I am very willing to meet with you to further discuss your report if you feel that would be helpful.



Ray Mabus

Attachments:  
As stated

cc:  
Chief of Naval Operations  
Commandant of the Marine Corps

**Recommendation 1:** We recommend the Department of the Navy to develop a unified Navy and Marine Corps criminal justice case processing and tracking system, and ensure its development and fielding. Continuing the current in-house efforts cannot be expected to resolve the problems experienced over the last two decades.

**Comment:** Concur.

Until recently, the DON was working on a system that would tend to satisfy this recommendation – the Department of the Navy Criminal Justice Information System (DONCJIS). In September 2010, DONCJIS was cancelled due to failure in performance tests and funding shortfalls. I have directed our executive for Enterprise Information Systems to identify a replacement system.

The goal of DONCJIS was to provide complete tracking of a criminal case in the DON from initial report to completion of appellate review, command action or investigative actions. The Navy and Marine Corps legal and law enforcement communities participated in the DON working group and Board of Governors for the project and provided stakeholder requirements input (for the judicial module) to the developers. DONCJIS would have provided processing/tracking information, including DIBRS reporting requirements, for all criminal justice cases in the DON regardless of whether the case entered the formal military justice process.



**Recommendation 2:** We recommend the Secretary of the Navy develop and field a single Navy and Marine Corps military justice case processing and tracking system that satisfies user requirements and achieves system-wide visibility over the entire court-martial process, including capability for an accused to monitor his/her appellate case status directly through web access.

**Comment:** Concur.

I am committed to developing a fully integrated DON military justice case processing and tracking system. Developing a fully integrated system is a JAG priority, as reflected in JAG Guidance 2010 (December 2009). The ultimate objective of such a system must be to accurately track all phases of a case through the military justice process in the DON in order to ensure timely accomplishment of the commander's military justice mission and ensure each accused Marine or Sailor receives due process. While this tracking system is being developed, we have systems in place to accurately track cases. Within the Navy, the Court Martial Tracking and Information System (CMTIS) is currently providing a functional real-time case tracking capability, augmented by manual back-up checks. Within the Marine Corps, CMS, a single, mandated Corps-wide tracking system, provides all the visibility necessary for supervision to the HQMC level and provides an "accounts receivable" to the NMCCA for all Marine cases requiring appellate review.

In March 2010, the JAG initiated a Center for Naval Analysis (CNA) study, concurred in by the Department of the Navy (Chief Information Officer) (DON CIO), the Next Generation Enterprise Network System Program Office (NGEN SPO), and the DON Assistant for Administration (DONAA), to examine current Navy and Marine Corps case tracking systems, and also benchmark against the Federal Court's Case Management and Electronic Case Filing (EC/CMF) system, as well as systems employed by the Air Force and Army. The CNA study, which is due in February 2011, will assist in identifying possible options for a unified Navy and Marine Corps system. The CNA study may also provide a basis for a DoD wide system.

The Navy and Marine Corps have instituted numerous IT system improvements to monitor case tracking, but there is room for improvement, for example:

- **Electronic Court Case Files:** Most state and federal courts systems are moving to fully electronic/digital court records. Electronic records comply with the Paperwork Reduction Act, speed delivery of process, and automate functions.
- **Access to Data:** A single, complete data entry, storage and retrieval system that incorporates all criminal incident information across the Navy and Marine Corps will meet all current and future reporting requirements and enable criminal activity statistical trend analysis. (See response to Recommendation 1)
- **Case Management:** Need to enable end user (investigators, counsel, support personnel) to quickly and effectively generate materials for courts-martial processing based on underlying system data (e.g. auto populated forms) and effectively distribute and document court compliance practices electronically to reduce manpower and improve efficiency.

- **Workload analysis:** An IT system to effectively manage legal offices, including managing personnel work load, identifying performance trends, streamlining internal processes and evaluating manpower requirements, is standard practice in the private sector.

DON will continue to pursue an integrated Navy and Marine Corps system., A Department of Defense (DoD) integrated system could be a more optimum long term solution.

**Recommendation 3:** We recommend the Secretary of the Navy issue policy establishing uniform post-trial processing standards, procedures, time guidelines and process responsibilities for the Navy and Marine Corps. Although our review focused on post-trial processing, more detailed process standards should be established for the entire courts-martial process and should be institutionalized in Service policy.

**Comment:** Concur.

Navy Regulations (Article 0331) and SECNAVINST 5430.27 (Subj: Responsibility of the Judge Advocate General and Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services) assign oversight of the DON's military justice system to the JAG. As highlighted by the DoD IG in Appendix L, the JAG has already taken steps to ensure satisfactory post-trial processing. Specifically, the DoD IG noted the following: (1) in 2009 the JAG, "approved 'reporting' triggers for briefing military justice cases to the Military Justice Oversight Council"; (2) in 2010, the JAG adopted the development of a Navy and Marine Corps case tracking system as a JAG 2010 priority item; and (3) from June to September 2010 the JAG would, "conduct a zero-based review of military justice policy and execution directives in the Department of the Navy to ensure current practices are institutionalized and practitioners have ready references for guiding their practice and ensuring compliance with relevant requirements." DON military justice experts agree that arbitrary, one-size-fits-all process timelines are not as helpful as careful tracking and oversight tailored to individual cases.

Through JAGINST 5814.1A, JAG has established a requirement for the Commander, Naval Legal Service Command and the Staff Judge Advocate to the Commandant of the Marine Corps to institutionalize the post-trial processes that are working successfully in the respective service environments.

The SJA to CMC has already initiated the process of standardizing post-trial processes within the Marine Corps, including implementing a standard post-trial Staff Judge Advocate Review letter and a standard Convening Authority's Action form. In addition, the SJA to CMC is currently undertaking a review of other standards and local SOPs in the Marine Corps for consolidation and development of Marine Corps wide post-trial processes and standards. Under the purview of the Commanding General's Inspection Program, the Marine Corps recently implemented a new standard 16 page checklist addressing SJA offices, Legal Service Support Sections, and Law Centers. This checklist provides Commanders with the ability to measure the performance of their legal professionals and hold them accountable to standards.



**Recommendation 4:** We recommend the Secretary of the Navy, or the Judge Advocate General of the Navy if so empowered, extend authority for the Navy Region Legal Service Offices and Naval Legal Service Command to supervise and direct timely and accurate post-trial processing by Navy independent (afloat) staff judge advocates. Independent staff judge advocates currently do not have a supervisory legal organization to which they answer for post-trial processing, either for specific issues or for military justice administration overall.

**Comment:** Concur, in part.

I concur that Commander, Naval Legal Service Command and Region Legal Service Offices should supervise and direct timely and accurate post-trial processing by independent and afloat staff judge advocates. I do not concur that independent staff judge advocates currently do not have a supervisory legal organization to which they answer for post-trial processing, either for specific issues or for military justice administration overall.

As reflected on page 89 of the DoDIG Draft Report, in 2005 the JAG directed Region Legal Service Offices (RLSO) and Naval Legal Service Command (NLSC) to supervise and direct timely and accurate post-trial processing by all commands in their areas of operation, including Navy independent and afloat staff judge advocates (SJAs).

Independent SJAs in the Navy provide general legal advice to their respective Commanders within their operational chain of command. For the specialized task of managing military justice cases through the pre-trial, trial, and post-trial phases up to docketing of a case on appeal at the Navy-Marine Corps Court of Criminal Appeals (NMCCA), Navy convening authorities and their independent SJAs rely on the advice and guidance of the cognizant RLSO.

**Recommendation 5:** We recommend the Secretary of the Navy direct a comprehensive review to identify the staffing needed to meet military justice requirements in the Navy and Marine Corps. The review should assess staffing adequacy and mix, and take into account the impact(s) frequent deployments and mandates to fill uncompensated billets have on the ability to complete mission requirements. The review should also assess the potential benefits from civilianizing some officer or enlisted billets to enhance continuity and help assure uninterrupted service in the post-trial process. The ongoing Section 506 panel review provides an opportunity for immediately assessing the needs.

**Comment:** Concur.

A comprehensive review would be useful, and the ongoing Section 506 Panel review provides that very opportunity for assessing manpower needs.

The JAG is providing a comprehensive review of Navy JAG staffing needs to the Chief of Naval Personnel as well as cognizant Budget Submitting Offices. Likewise, the Staff Judge Advocate to the Commandant of the Marine Corps is working closely with the Deputy Commandant for Manpower and Reserve Affairs and the Total Force Structure Division to assess Marine Corps' manpower needs.

Per DoD IG recommendation, the JAG intends to evaluate the feasibility of civilianizing post-trial review billets in the Region Legal Service Offices and will report the results of this review in the Annual Report on Military Justice within the Department of the Navy, due 30 November 2010.

**Recommendation 6:** We recommend the Secretary of the Navy, Commandant of the Marine Corps, and Judge Advocate General of the Navy take appropriate steps to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to:

**a. exercise professional supervision over Marine judge advocates and the legal services they deliver**

**Comment:** Concur.

By statutory definition, the Staff Judge Advocate to the Commandant currently functions as a command legal advisor to the Commandant without authority to supervise the administration of military justice throughout the Service. I have taken steps to address this gap in two ways. First, I have directed the JAG and the SJA to CMC, in coordination with the General Counsel, to revise SECNAV Instruction 5430.27C in a way that would provide the SJA to CMC with increased responsibility and authority to set and maintain standards for the administration of military justice and the provision of uniformed legal services in the Marine Corps. Second, I will propose legislation that would establish a direct relationship between the Secretary and the SJA to CMC to enhance oversight and accountability over the SJA to CMC as the officer with that authority.

**b. conduct Article 6, Uniform Code of Military Justice (UCMJ) inspections in the Marine Corps.**

**Comment:** Concur.

The revision of SECNAVINST 5430.27C that I have directed will provide an express delegation of the JAG's Article 6, UCMJ, inspection responsibilities within the Marine Corps to the SJA to CMC. Further, I will propose legislative change to 10 USC § 806 to expressly make the SJA to CMC responsible and accountable for the conduct of Article 6, UCMJ, inspections within the Marine Corps. Both the regulatory and proposed statutory changes will be drafted to ensure consistency with the JAGs Title 10 authorities. Statutory change will thus place the responsibility for this function with the officer best positioned to perform it and provide the clearest line of accountability.

**Recommendation 7:** We recommend the Secretary of the Navy prepare annual reports detailing post-trial processing improvements, *Moreno* compliance, and progress in developing a comprehensive and effective case processing and tracking system.

**Comment:** Concur.

The JAG has already initiated an annual reporting process. The first annual report was compiled in September 2009. The second annual report is due 30 November 2010. This annual report will be provided to the Secretary of the Navy, via the Service Chiefs, thus ensuring adequate Service input and comment to the Secretary.

The requirement to continue annual reports is proposed for institutionalization in the proposed Secretary of the Navy instruction currently in coordination. The report will be a comprehensive assessment of the military justice practice across the Department of the Navy (including the Marine Corps).

**Recommendation 8:** We recommend the Judge Advocate General of the Navy establish a joint Navy and Marine Corps task force to review and assess systems such as the Federal Case Management / Electronic Case Filing (CM/ECF) system for possible fielding in the Navy and Marine Corps. The Navy should explore opportunities for including the Army and Air Force in the study, and making such a system a DoD-wide application.

**Comment:** Concur.

In March 2010, the JAG initiated a study of Navy JAG Corps IT requirements, including post-trial tracking systems. The study, conducted by the Center for Naval Analysis (CNA), is benchmarking the Federal Court's Case Management and Electronic Case Filing (EC/CMF) system, as well as the Marine Corps' CMS and those systems employed by the Air Force, Army, and Department of Justice. The CNA study will assist in identifying possible options for a unified Navy and Marine Corps system, and potentially commonalities across DoD. Once this study is completed, and the recommendations received, the DON will make an overall assessment of the IT system(s) to pursue.

Although DON will continue to pursue an integrated Navy and Marine Corps system, an integrated DoD system may be a more optimum solution. Currently, each Service has its own case tracking system and none have an electronic case filing system. For long-term efficiency across the Services, moving to a unified system could be advantageous. The Navy JAG will make the results of the CNA study available to the Army and Air Force to evaluate the potential for adopting a common system.



**Recommendation 9:** We recommend the Judge Advocate General of the Navy implement a comprehensive and detailed inspection program for military justice administration in field units and ensure the inspections address processes and tracking systems. Independent (afloat) legal units should be included in the inspection program.

**Comment:** Concur.

With respect to the Navy, JAGINST 5040.1 was issued on June 14, 2010, and updates policy, responsibilities, and procedures for assessment of legal offices staffed by Navy JAG Corps community personnel, to include independent SJA offices.

JAGINST 5040.1 provides that there will continue to be frequent (annual) inspections of every RLISO, as well as Naval Justice School (NJS) and selected SJA Offices. By instruction, a subject matter expert in military justice will participate in every inspection of every RLISO. This subject matter expert is to provide a complete and detailed assessment of the RLISO's performance and compliance with statutory and regulatory requirements – to include post-trial processing of courts-martial – and also to review Naval Legal Service Office (NLSO) performance (defense and personnel representation functions).

With respect to the Marine Corps, the draft report details the actions already completed by the SJA to CMC to enhance both the Commanding General's Inspection Program and his own Article 6 inspection process, specifically to ensure compliance with standards and processing times. These USMC inspections programs are designed to be complementary.

**Recommendation 10:** We recommend the Judge Advocate General of the Navy establish a Chief Defense Counsel or equivalent position in the Navy. The Navy is the only Service without such a position, and the defense community lacks leadership and a community advocate to oversee defense services and assure proper resources and training are available.

**Comment:** Concur.

This recommended action was initiated in December 2009. On 1 July 2010, Commander, Naval Legal Service Command (CNLSC) stood up the new Defense Counsel Assistance Program (DCAP), which is separate and distinct from the Office of the Judge Advocate General Criminal Law Division (Code 20) and the Appellate Defense division. The Director of DCAP is an experienced senior officer member of the Military Justice Litigation Career Track. An assistant director has also been detailed to the office. This office will augment the growth and expertise of the Military Justice Litigation Career Track by providing reach-back support dedicated to the specific needs of trial defense counsel.

The Director of DCAP works under the direct supervision of Deputy Commander, Naval Legal Service Office (DCOM-NLSO). The DCAP Director supervises only those personnel detailed to DCAP but will assist DCOM-NLSO in the exercise of her oversight and reporting responsibilities. DCAP is also available to defense counsel as a resource to assist in defending cases.

In addition to establishing DCAP, on 1 October 2010, CNLSC stood up the complementary Trial Counsel Assistance Program (TCAP) to support Region Legal Service Offices (RLSOs) by providing advice and assistance to government trial counsel throughout every phase of court-martial litigation. Service as the military justice subject matter expert on government-related matters for CNLSC, TCAP counsel may be consulted to provide support to trial counsel in all aspects of case preparation, including, but not limited to, drafting charges and specifications, drafting motions, preparing expert witnesses, devising trial strategy, and assisting with post-trial matters.

The Director of TCAP works under the direct supervision of Deputy Commander, Region Legal Service Office (DCOM-RLSO). The TCAP Director supervises only those personnel detailed to TCAP but will assist DCOM-RLSO in the exercise of his oversight and reporting responsibilities. TCAP will provide government related subject matter expertise and support to RLSO trial counsel when requested by trial counsel, the RLSO CO, or as directed by DCOM-RLSO. TCAP is also available to government counsel as a resource to assist in the prosecution of cases.

The Marine Corps has had a Chief Defense Counsel since 1985.

**Recommendation 11:** We recommend the Secretary of the Navy initiate a legislative proposal to amend Article 27(b), Uniform Code of Military Justice, authorizing the Staff Judge Advocate to the Commandant of the Marine Corps to certify a Marine judge advocate's competence to perform duties as a trial or defense counsel.

**Comment:** Concur, in part.

Concur that statutory change to enhance and clarify the authority of the SJA to CMC over the professional delivery of legal services, including supervision of the administration of military justice, within the Marine Corps is necessary. These changes are best accomplished by modifications to 10 U.S.C. § 5041, 5046, 1044, and 806 as implemented by revisions to relevant Departmental and Marine Corps regulations. With these enhancements of the authority of the SJA to CMC, and given the integrated court system of the Department of the Navy, amendment of Article 27(b) is unnecessary.



**Recommendation 12:** We recommend the Judge Advocate General of the Navy provide at least annual military justice updates to the Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps. The updates should address relevant military justice matters and system health, including progress in establishing effective oversight and tracking mechanisms for post-trial processing.

**Comment:** Concur.

The JAG has already initiated an annual reporting process. The first annual report was compiled in September 2009. The second annual report is due 30 November 2010. This annual report will be provided to the Secretary of the Navy, via the Service Chiefs, thus ensuring adequate Service input and comment to the Secretary.

The requirement to continue annual reports is proposed for institutionalization in the proposed Secretary of the Navy instruction currently in coordination. The report will be a comprehensive assessment of the military justice practice across the Department of the Navy (including the Marine Corps).

**Recommendation 13.** We recommend the Judge Advocate General of the Navy update applicable service policy documents such as the Naval Legal Service Command Manual, the Judge Advocate General Manual, and the Legal Administration Manual to:

a. Establish uniform business rules for shipping/transmitting records of trial to the Navy-Marine Corps Appellate Review Activity to assure speedy, positive tracking capability and visibility over records of trial at both field and appellate levels.

b. Require the Navy-Marine Corps Appellate Review Activity to send all court “mandates” requiring convening authority action through the servicing field legal offices.

c. Require convening authorities, upon completing a court-mandated action, to return the completion documents to the Navy-Marine Corps Appellate Review Activity through the servicing field legal office.

**Comment:** Concur.

The Manual of the Judge Advocate General JAGINST 5800.7E (JAGMAN) is applicable throughout the Department of the Navy. The Naval Legal Service Command Manual is a U.S. Navy directive. The Legal Administration Manual is a Marine Corps Order.

With respect to shipping/transmitting records of trial, JAGINST 5813.1B was signed on 29 September 2010 (Subject: “Standardization of General Courts-Martial and Special Courts-Martial Verbatim and Summarized Records of Trial”) and requires that all records of trial requiring review under Article 66 or 69, U.C.M.J., shall be sent to the Office of the Judge Advocate General via FEDEX/UPS/DHL/USPS Express or by hand delivery when feasible and authorized by trial counsel. The Marine Corps is currently conducting a pilot project to test the use of electronic records of trial. Possible results from this project include reduced costs, improved post-trial processing timelines, tracking, and service/departmental visibility.

With respect to the sending and return of mandates, The Manual of the Judge Advocate General (JAGMAN) chapter I has been revised and is currently being officially coordinated prior to final approval. We anticipate promulgation of the revised JAGMAN in December 2010. JAGMAN section 0155(c)(1) will be amended to formalize current practice by including the following language based upon the recommendation above:

All supplementary orders that require convening authority action shall be returned to the convening authority via the servicing Region Legal Service Office or area Marine Corps Staff Judge Advocate’s office. Additionally, once the court-mandated action is complete, convening authorities shall return the completion documents to the Navy-Marine Corps Appellate Review Activity via the same office.

The SJA to CMC is currently revising the Legal Administration Manual to reflect these new processes.

**Recommendation 14.** We recommend the Judge Advocate General of the Navy monitor and maintain Reserve unit support for the appellate divisions and the Navy-Marine Corps Court of Criminal Appeals to assure sufficient numbers and experience to accomplish missions and meet immediate surge requirements.

**Comment:** Concur.

The JAG and SJA to CMC monitor Reserve support to these organizations continuously.

The appellate divisions and NMCCA have separate supporting reserve units. Appellate Government (OJAG Code 46) is supported by 13 Naval Reserve judge advocates. Appellate Defense (OJAG Code 45) is currently supported by 20 Naval Reserve judge advocates, one Reserve Legalman and five Marine Corps Reserve judge advocates. The NMCCA units presently include 10 Naval Reserve appellate judges and two Marine Corps Reserve appellate judges.

The number of assigned personnel is monitored through the Military Justice Oversight Council and assignment processes of the JAG and SJA to CMC on behalf of the Commandant of the Marine Corps.

The Reserve Legal Services Support Section (RLSSS), Judge Advocate Division, HQMC, provides effective centrally managed administration, command and control of the delivery of Reserve legal services to the Total Force, and ensures that trained and qualified legal personnel are available to support active duty requirements as directed, including the appellate divisions and NMCCA.

**Recommendation 15:** We recommend the Judge Advocate General of the Navy maintain an O-6 grade authorization for, and fill the Director, Appellate Defense Division (Code 45), position at the O-6 level.

**Comment:** Concur.

The Director, Appellate Defense is authorized as an O-6 billet and has traditionally been filled by an O-6. Although temporary gaps may be unavoidable given military personnel rotations, the JAG Corps recognizes the importance of this billet and is committed to maintaining continuity and seniority.

**Recommendation 16:** We recommend the Judge Advocate General of the Navy examine effectiveness and utility in the 1-year clerkship program established to enhance appellate counsel training and either modify or rescind the program.

**Comment:** Concur.

The appellate court clerkship program is valuable and contributes to NMCCA efficiency. However, the JAG is currently reviewing assignment options to assess the effects of two year (vice three-year) tours in the appellate divisions that arise when an officer is first assigned to a year-long clerkship prior to arriving at an appellate code. The appellate court clerkship program is vital to the mission of the NMCCA and is a highly valued experience by counsel who serve as law clerks. The results of this review will be addressed in the Annual Report on the State of Military Justice within the Department of the Navy.



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IN REPLY REFER TO

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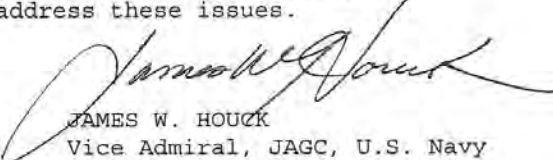
From: Judge Advocate General  
To: Secretary of the Navy

Subj: COMMENTS ON "EVALUATION OF POST-TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY"

Encl: (1) Case Tracking and Management  
(2) Standards and Timelines  
(3) Supervision and Oversight  
(4) Inspections  
(5) Chief Defense Counsel  
(6) Improvements Noted  
(7) Additional Comments

1. The Department of Defense Inspector General's draft "Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy" addresses many important issues. The review has provided useful insight that we will incorporate into our ongoing effort to provide a first class military justice system.

2. Other aspects of the report require clarification.  
Enclosures (1) through (7) address these issues.



JAMES W. HOUCK  
Vice Admiral, JAGC, U.S. Navy

Enclosure (1):  
Case Tracking and Management



### **CASE TRACKING AND MANAGEMENT (Draft report section I.A)**

The draft DoD IG report includes numerous references to the Navy's Court Martial Tracking and Information System (CMTIS). The report notes that while CMTIS "represents progress in recent years," the Navy "still [does] not have the visibility they need to monitor case progress and timeliness across the post-trial process."

Today, CMTIS provides a functional, accurate, real-time case tracking capability. Specifically, CMTIS provides:

- An accurate cradle-to-grave Navy case tracking from referral to receipt by NAMARA.
- A single post-trial tracking report based on CMTIS data used by Navy Legal Service Command (NLSC) and all Region Legal Service Office (RLSO) commands.
  - Post-trial data access: In addition to the report, CMTIS post-trial tracking data is available to NLSC and RLSO via excel spreadsheet that contains all critical data elements; this permits NLSC and RLSO specific reports based on CMTIS data.
  - NLSC and RLSO have access to and visibility on all open and closed Navy cases.
- A system to monitor speedy trial and Moreno cases.

CMTIS was first employed on 01 October 2006. CMTIS was proposed by the OJAG Knowledge and Information Services Division (Code 65) as an alternative to the Homeport Electronic Legal Management (HELM) system, which, at the time, was the latest in a series of inadequate ventures with external contractors. In addition to the case tracking features noted above, CMTIS has the following objectives:

- Performance metrics. As mentioned in the DoD IG Report, the JAG Corps needs to ensure it has the right manpower and force mix to accomplish the mission. To accomplish this, the JAG Corps needed a tool that captures what type of work is being done and where, how much work is being done, and who is doing the work (e.g., Legalman, attorney, or civilian, and what paygrade). As the JAG Corps is a service organization, capturing its work involves capturing how much time personnel are spending on legal work. With CMTIS time data, the JAGC can determine current manpower and force mix requirements, and become more predictive on manning and force mix for its Navy client (e.g., when an aircraft carrier changes home port, the JAG Corps needs to understand what legal work is associated with the change in home port so it can change the manpower and force mix of the supporting legal office. CMTIS was designed to support this type of analysis).
- Case management. CMTIS is designed to support case management, not only in court-martial work, but in all JAG Corps business lines. Legal offices, whether Naval Legal Service Command offices or SJA offices, needed a tool to manage workload and have visibility on all work and cases within its office. The JAG Corps needed a knowledge management system that could 1) collect data for trend analysis, 2) retain historical



electronic files as opposed to paper legal files, and 3) a networked database to share information across offices and provide both JAG Corps Headquarters and legal offices with access to a single data base.

From initial deployment to present, OJAG has revised CMTIS in response to several factors. User interfaces were not always intuitive or user-friendly. CMTIS' interaction with NMCI was sometimes dysfunctional (CMTIS was not alone in this regard). Many JAG users resisted the time-counting features (e.g., "I didn't come to the JAG Corps to bill hours.") In recent years, some of the initial challenges have been eliminated or mitigated. In-house developers have made numerous design and functionality improvements and JAG users have become more accepting of the need for workload data collection and centralized case tracking. Despite these gains, the system has important shortcomings.

- Data access: There is no current ad-hoc search capability allowing the user to obtain only desired data elements. A consistent complaint about CMTIS is access to data and the inability to do searches of the data base to answer management questions or requests for information. Data is accessed via established reports which are time consuming to build and do not always meet end-user's requirements.
- Ease of use: Design of CMTIS modules is under review to provide a more intuitive and faster data input capability. [Current design has too many screens, it is difficult to edit/correct data, and there is no automated error checking system.]
- NMCI: NMCI bandwidth issues continue to make access to CMTIS problematic. [Cannot be used for real-time service as the system often times out too quickly, requiring logging back in (sometimes as many as 40 times a day).]
- More standardized IT Governance: JAG Corps is developing, with the assistance of CNA, a more institutionalized IT governance system for IT organization, processes, and service management.
- Training and knowledge on how to use CMTIS beyond the basic elements is poor even with established business rules and NJS training. Given the high turnover of military personnel and the CMTIS ease of use issues, there are continued concerns about proper data entry into CMTIS. A more robust training program is necessary and is being studied for implementation.

CMTIS has been on line for 4 years. In 2009, having observed CMTIS performance for three full years, the JAG assessed the need for a comprehensive review of next generation JAG Corps IT systems, including court-martial case management and post-trial tracking. Given the JAG Corps' history with a series of tracking systems, the JAG determined that an external assessment was important to making objective decisions about CMTIS as well as potential follow-on systems. Accordingly, in March 2010, the Center for Naval Analysis (CNA) was hired to perform the review. This review is scheduled to be completed in February 2011.

Enclosure (2):  
Standards and Timelines

### **STANDARDS AND TIMELINES (Draft report section I.B)**

The Report finds fault with a lack of standardization in procedures for case processing in the Navy and Marine Corps. The Report expresses concern that Navy and Marine Corps field commands have different, unit-developed standard operating procedures for case processing. I agree that some standardization in formal instructions, standardized checklists, and templates is useful.

The Navy JAG Corps has instituted numerous changes to ensure those are in place. These include the cancelling of out-dated, confusing checklists and timeline instructions, and emphasizing the guidelines mandated by the Court of Appeals for the Armed Forces (CAAF) in the *Moreno* case. It also includes the review, revision and promulgation of several key instructions, including revisions to the Manual of the Judge Advocate General (JAGMAN), the Naval Legal Service Command Manual, the Standardization of Verbatim Records of Trial, and the Post-Trial Checklist, all of which include procedures and timelines. Reporting “triggers” have also been incorporated into the Navy’s standardized reporting process. These triggers include identification and reporting to headquarters of cases that exceed 75 days from sentence to convening authority’s (CA’s) action, the reporting to cognizant Assistant Judge Advocates General (AJAGs), and the Military Justice Oversight Council (MJOC), of appellate cases that exceed 120 days from sentencing to CA’s action and 150 days from CA’s action to docketing, cases docketed for longer than a year, cases in an appellate court panel longer than 6 months, and any case in which there have been more than 3 continuances requested by either party. The MJOC is incorporated into a pending Secretary of the Navy Instruction. I disagree that “*Moreno* timelines are the only standards the Navy and Marine Corps currently use to measure timeliness in post-trial processing.” Report at 10. However, I agree that *Moreno* timelines are our ultimate standard, given that they have been imposed by CAAF.

The result of our emphasis on meeting on standards and timelines, along with enhanced oversight, is clear: The appellate process has not exceeded the 18-month guideline of the *Moreno* decision in any case this year, and only exceeded that guideline in two cases in 2009. One case was *Foster*; the other case required no corrective action.

The Report also blurs the nature of “*Moreno* violations” as well as the statistical picture of progress in post-trial processing, permitting an incorrect perception that many more appellants have been prejudiced by untimely post-trial processing than is in fact the case. While analysis of historical post-trial process trends is critical, the manner in which the Report portrays post-trial processing since 2006 is misleading.

#### **“*Moreno*” Compliance Clarified**

When discussing post-trial processing under the *Moreno* guidelines, it is essential that the parameters of the discussion be clearly articulated. The Report is not precise in its use of the term “*Moreno* cases” or “*Moreno* compliance.” Specifically, the CAAF mandate in the *Moreno* case applies to cases tried on or after 10 June 2006, and cases on appeal that were docketed on or after that date. Additionally, however, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) used *Moreno* as guidance, and applied that guidance to *all* cases decided after 10 June 2006, regardless of when the case was tried or docketed. Even when so applied, exceeding the timelines in *Moreno* results in a presumption of unreasonable delay – not a *per se* due process



violation meriting relief. As a result, any review of "*Moreno* performance" should indicate precisely which cases are being discussed and whether a case is noteworthy because it simply does not meet the guidelines for timeliness, or because the appellant was not provided due process and was granted relief by the appellate courts. From 10 June 2006, the effective date of the *Moreno* decision, CMTIS contains cases decided by the NMCCA which reflect post-trial processing that exceeded the timelines of the *Moreno* decision, but that is just the beginning of the analysis. In none of these cases was there any finding of prejudice and no relief granted by the court. CMTIS also contains cases in which NMCCA granted relief for excessive post-trial delay, but for which *Moreno* is not binding precedent.

The following three paragraphs clarify "*Moreno*" compliance for the periods of post-trial processing from trial to docketing at the NMCCA; and from docketing to decision by the NMCCA:

- (1) Relief for Due Process Violations. Of the 4,876 cases NMCCA decided since 10 June 2006 (the *Moreno* effective date), NMCCA has granted relief for excessive post-trial delay in 108 cases due to prejudice to an appellant (48 in 2006; 45 in 2007; 10 in 2008; 1 in 2009 [*U.S. v. Foster*, plus 4 dismissal orders for lost records of trial]; and 0 in 2010). Despite the unacceptable number of delayed cases adjudicated in the years immediately following the *Moreno* decision, it must be understood that, other than *Foster*, these are pre-*Moreno* cases (i.e., cases tried or docketed on appeal before 10 June 2006). The Report fails to correctly identify these cases as such. It also fails to describe that there are *no* cases other than *Foster* to which the *Moreno* precedent applies that have required relief by either the NMCCA or the CAAF for post-trial delay. The pattern of improvement in post-trial process is clear.
- (2) Pre-*Moreno* Cases – Timeliness on Appeal. Of the 956 cases docketed before, but decided after *Moreno*, 187 cases exceeded 18 months from docketing to decision (104 in 2006; 75 in 2007; 8 in 2008; 0 in 2009; and 0 in 2010). Once again, despite the unacceptable number of delayed cases *decided* in the years immediately following *Moreno* (but which pre-dated the case's effective date), improvement in the appellate process is clear.
- (3) Post-*Moreno* Timeliness on Appeal. Among the 3,920 cases docketed with the NMCCA since the effective date of *Moreno*, the NMCCA has exceeded 18 months from docketing to decision in only 10 cases (1 in 2007; 7 in 2008; 2 in 2009; and 0 in 2010). The leadership and specific corrective actions of the Judge Advocate General and Staff Judge Advocate to the Commandant of the Marine Corps have progressively reduced the time needed to process appeals, and have achieved 100% with the *Moreno* guidelines.

Enclosure (3):  
Supervision and Oversight

#### **SUPERVISION AND OVERSIGHT (Draft report section I.C)**

As discussed above, numerous leadership, supervision and oversight initiatives have been very effective in ensuring compliance with post-trial processing, despite the decentralized organization of the Navy and Marine Corps. Contrary to the DoD IG report assertion, the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) has been authorized to conduct Article 6 inspections of Marine Corps field offices since 1999 by agreement between the JAG and SJA to CMC. See MCO P5800.16A. The JAG/SJA to CMC agreement was further ratified in 2005. See SECNAVINST 5430.27. To establish more visible and enduring authority, the Secretary of the Navy intends to propose that the current authority be codified in statute. The authority of the SJA to the CMC to conduct Article 6, UCMJ inspections of USMC military justice field activities derives from his professional relationship as a judge advocate providing legal services under the cognizance of the JAG. That relationship is established by Navy Regulations and embodied organizationally in MCO P5800.16A (1999) and SECNAVINST 5430.27C (2009).

Enclosure (4) :  
Inspections

### **INSPECTIONS (Draft report section I.D)**

Several passages of the draft report contain the characterization that the JAG “retreated” from rigorous military justice inspections in 2006, implying that the JAG abrogated his responsibilities in overseeing and inspecting the provision of military justice services in the field. This is an inaccurate portrayal.

Over the past four years, the JAG Corps has followed the principle that an organization gets the results it measures, and the Navy JAG Corps has been measuring Region Legal Service Office performance in the areas of trial and post-trial processing. The proof is in the measured improvement at every segment of post-trial processing, culminating in FY09 and continuing in FY10, when average processing times were all within Moreno guidelines. Perhaps more importantly, neither CAAF nor the NMCCA have found any post-trial due process violations in any court-martial conviction since the *Moreno* case. It is also incongruous to portray the JAG as retreating from rigorous inspections when the pre-2006 inspection regime was a critical element of a system the report criticizes.

In 2007, the JAG and Commander, Naval Legal Service Command (NLSC) agreed that the Article 6 program needed to become more – not less – rigorous, and that the program needed to expand well beyond the standard three to four year visit cycles focused heavily on instructions and administrative matters. The goal – consistent with practices emphasized by Navy leadership and taught in the Navy Corporate Business Course – was to develop a comprehensive review program focused on actual results (as opposed to administrative inputs), and to measure these results through a system of carefully developed metrics.

As stated in JAGINST 5040.1D, the intent of that 2007 decision was to make the Article 6 process more rigorous by conducting field inspections on an annual vice three year basis and having these supplemented by additional information that would be gathered and evaluated year round. A wider array of tools was envisioned to continuously assess performance and the new inspection program was carefully designed to evaluate these fundamental elements:

- Quality: The objective was to determine if Navy Judge Advocates provided first-rate advocacy and judicial services. This was to be measured through:
  - Client surveys. The JAG Corps’ assessment program sought input from client commands as one metric to help determine the quality of our performance in military justice. In August 2007, a survey was sent to 851 command clients, including Commanding Officers, Executive Officers and Command Master Chiefs. The survey results identified areas that the client commands perceived as strengths, as well as other areas perceived as needing improvement. The original plan was to target areas needing improvement and then to measure over time the extent to which clients perceived improvement. Although the results of the initial survey were widely publicized within the JAG Corps so that unit leaders could act on them, the cost and level of effort required to deploy follow-on surveys have proven considerable. The Navy JAG Corps will continue to use client surveys, however they will be less frequent than originally envisioned.



- **Military Judge Surveys.** The initial surveys in 2008 were conducted in coordination with the University of North Carolina. The military judges submitted anonymous quarterly surveys assessing the overall skill level of RLSO and NLSO personnel as reflected in courts-martial practice across a number of measures, including technical proficiency of counsel in court, the frequency of supervisory personnel in the courtroom and whether improvement is noted across quarters. A second military judge survey began in July 2010 and is ongoing.
- **Headquarters (HQ) Assist Visits.** JAGINST 5040.1 requires on-site participation by subject matter experts (SME) for Military Justice and for Legal Assistance. As part of the inspection process, these SME's also provide HQ Assistance – providing advice regarding military justice and legal assistance and on-site training and mentoring regarding these topics. In addition to this Article 6 on-site assistance, other HQ Assistance is provided through flag visits and other SME's throughout the year including assistance in Personnel matters, Personnel Security, Facilities, Ethics and Standards of Conduct, Recruiting, and Office Administration.
- **Military Justice Litigation Career Track fill rates.** This involved affirmative monitoring of the assignment of MJLCT personnel to P-coded billets during the detailing cycles, including leadership positions. The “fill-rate” for these billets has increased for the first two detailing cycles (37% [19 of 52 billets] and 56% [29 of 52 billets], respectively) and the third cycle is underway with specific emphasis by the JAG on continuing to increase the number of MJLCT personnel assigned to these key military justice litigation billets.

➤ **Timeliness.** As measured through:

- **Review of Speedy Trial.** We established that conducting a case within speedy trial standards would be a closely monitored metric. We closely monitored any speedy trial cases in violation of Article 10 or Rule for Courts-Martial 707, Uniform Code of Military Justice, and disseminated lessons learned. Affirmative monitoring of case status was accomplished through weekly command high visibility case reports to CNLSC of high profile litigation, specifically including speedy trial motions and cases involving speedy trial issues, weekly briefs to the Judge Advocate General and monthly MJOC meetings. For example, there have been no cases in the Naval Legal Service Command dismissed on speedy trial grounds in at least the last two years.
- **Moreno guideline compliance:** Routine reporting of Navy courts-martial case post-trial processes that exceed internal triggers or “*Moreno*” guidelines. For example, any case exceeding 75 days from sentencing without a CA’s action are required to be reported to the Deputy Commander for RLSOs and to the MJOC. The NMCCA process is likewise tracked in CMTIS for all Navy and Marine Corps cases. Cases requiring appellate review which exceed internal triggers or *Moreno* guidelines are routinely reported to the MJOC. CMTIS reports since the effective date of the *Moreno* decision show continuous improvement in all

segments of post-trial processing, and *no* case convened after *Moreno* that required relief by NMCCA or CAAF as the result of unreasonable post-trial delay.

➤ Efficiency. As measured through:

- Review of Case Management Tracking Information System (CMTIS) data for the command. For courts-martial, efficiency was determined by comparing processing times for cases and their costs (legal personnel costs and other case costs, such as travel or expert witnesses). CMTIS data is also used to adjust case-to-counsel loading to ensure sufficient resources are available.

Also, in 2007, the JAG IG instituted a program for inspecting military justice as practiced in independent, SJA commands. Two SJA inspections have been conducted. Fleet Forces Command Force/Staff Judge Advocates were inspected by the JAG IG in 2009. On-site inspections were conducted at HQ Fleet Forces Command, AIRLANT, SUBLANT, and SURFLANT. Each of the Force Judge Advocates and their staff were interviewed and their work examined within the following areas making use of the checklist and guidelines of JAGINST 5040.1: Military Justice (Non-Judicial Punishment and Courts-martial); Ethics and Standards of Conduct; Professional Rules of Responsibility; JAGMAN Investigations; FOIA and Privacy Act administration. Additionally, on-site interviews were conducted with the Executive Officer and Legal Officer aboard an operational Destroyer within the Fleet Forces Command chain of command with respect to the administration of military justice.

U.S. Pacific Fleet Force/Staff Judge Advocates were inspected by the JAG IG in 2010. On-site inspections were conducted at HQ PACFLT, AIRPAC, SURFPAC, and SUBPAC. As with the prior inspection of Fleet Forces Command, each of the Force Judge Advocates and their staff were inspected and interviewed and their work examined within the following areas making use of the checklist and guidelines of JAGINST 5040.1: Military Justice (Non-Judicial Punishment and Courts-martial); Ethics and Standards of Conduct; Professional Rules of Responsibility; JAGMAN Investigations; FOIA and Privacy Act administration.

The concept above, as reaffirmed in JAGINST 5040.1, is sound. During the period from 2007 to June 2010, the Article 6/Command Inspection program operated under the guidelines of draft JAGINST 5040.1. During this period of time, we learned numerous lessons that will improve the program going forward.

- Surveys are valuable ways to gain insights into quality, but administration of the surveys is labor intensive and requires extensive analysis that the JAG Corps is not resourced for on a regular basis.
- An annual visit to 18 commands, plus a major SJA activity, is a demanding schedule for a single IG to execute effectively, even if he is not expected to conduct the entire inspection regime by himself. Periodic visits by subject matter experts are extremely labor intensive, but essential. Workload demands on the headquarters staff who must conduct field inspections create difficult tradeoffs, as they are the same personnel who



developed many of the improvements noted elsewhere in the report and who work initiatives on substantive areas (e.g., sexual assault).

- Although we have developed CMTIS into a comprehensive data-collection and case tracking tool, this has taken longer than expected due to issues with Navy Marine Corps Intranet (NMCI), the number and expertise of our programmers, the limitations of the original “off-the-shelf” product upon which CMTIS was built, and lessons learned from early design deficiencies. CMTIS is currently under review.

Building on the experience of the past three years, additional changes have been instituted.

- JAGINST 5040.1 was finalized on June 14, 2010, and codifies policies and builds on the experience of the past three years. These include:
  - The JAG IG inspections are now regularly augmented with subject matter expertise. This will be labor intensive and sustaining it will require additional resources. Commencing in October 2010, an officer or senior civilian with military justice expertise will assist the IG with all inspections of RLSOs and fleet units. In addition, the instruction requires developing a schedule that ensures subject matter expertise support to NLSO inspections as well, in support of both military justice and legal assistance.
  - The JAG Corps hired a full-time staff assistant for the JAG IG to support the JAG IG with administrative duties and certain investigative functions. This will enable the JAG IG to focus more directly on critical substantive aspects of the job.
- On October 1, 2010, Naval Legal Service Command was reorganized to separate the Naval Legal Service Office (NLSOs) and Region Legal Service Offices (RLSOs) into two separate functional groups. This separation included the creation of the Deputy Commander, RLSO and Deputy Commander, NLSO. Dividing NLSC into separate prosecution and defense groups will allow staff assistants and subject matter experts to engage with more focused communication and reach back assistance to counsel and commands, thereby enhancing oversight on a daily basis. This oversight will be facilitated by the October of 2010 establishment of both a Defense Counsel Assistance Program (DCAP) and a Trial Counsel Assistance Program (TCAP). The DCAP is led by a Navy O-6 MJLCT officer as its director, who serves in the role of a chief defense counsel of the Navy and reports to Deputy Commander, NLSOs. The TCAP is led by a Navy MJLCT O-5, who serves as the chief trial counsel of the Navy, reporting to Deputy Commander, RLSOs.

Based on the above, non-concur with the following conclusions:

- Page 4 “In 2006, the current Navy JAG (then the Commander, Naval Legal Service Command) retreated from rigorous military justice inspections, based on a belief that Naval Legal Service Command case monitoring, in conjunction with field inspections and field email reports, was a sufficient check.”

- Page 42 “In 2006, JAG IG inspection program was revamped as a one-man-interview-based review without any detailed inspection of military justice processes, records, performance, or metrics.”
- Page 43 “. . . the Navy retreated from more rigorous military justice inspections, believing its Naval Legal Service Command monitoring (based on CMTIS and other data), in conjunction with the Article 6 and more limited IG inspections, would be a sufficient tool. That belief was not fulfilled.”

I disagree with the conclusions on Page 13 “Although Article 6 inspections were conducted in the Navy and Marine Corps, the inspections were not rigorous or sufficiently thorough to highlight the significant process problems pervasive in both Navy and Marine Corps field units. As a result, the inspections had little impact on process failures, which persisted due to continuing problems. Coupled with the Navy JAG’s misplaced reliance on CMTIS (after its fielding in October 2006) to ensure needed visibility over cases during field processing, nonprocess-oriented inspections did not detect post-trial process or delay problems.”

As noted earlier, improvements in the oversight process are warranted, but fundamentally, the ultimate results are different than characterized by the DoD IG. Navy post-trial processing has steadily improved as a result of delegating responsibility to RLSO Commanding Officers and holding them accountable to ensure post-trial processing compliance. Of cases tried after the *Moreno* case’s effective date (10 June 2006), *no* Navy or Marine Corps case has required relief for unreasonable post-trial delay by either the NMCCA or the CAAF. That is a reflection of the improvement in timeliness at every segment of post-trial processing. The average time from sentencing to convening authority’s action in FY07 (the first year for which CMTIS has complete data) was 93 days – already within the *Moreno* guidelines issued the year before. The average time for this segment of the post-trial process declined further by FY10 to 83 days. In fact, every year since *Moreno*, the average time from sentencing to convening authority’s action has remained well below the 120 days permitted by the established guidelines. The average time from the convening authority’s action to receipt for docketing has also fallen from a high of 69 days in FY07 to 14 days in FY10 – less than half of the *Moreno* guideline. Of those cases docketed after the *Moreno* case’s effective date in 2006, only ten Navy or Marine Corps cases exceeded 18 months from docketing to decision by the NMCCA.

Enclosure (5) :  
Chief Defense Counsel

#### **CHIEF DEFENSE COUNSEL (Draft report section I.E)**

Recognizing the unique issues and challenges of the defense counsel community, the JAG had already planned to realign organizational structure prior to the DoD IG report. Appropriate organizational changes have already been implemented.

On 1 July 2010, Commander, Naval Legal Service Command (CNLSC) stood up the new Defense Counsel Assistance Program (DCAP), which is entirely separate and distinct from the Office of the Judge Advocate General Criminal Law Division (Code 20) and the Appellate Defense division. The Director of DCAP is an experienced senior officer member of the Military Justice Litigation Career Track. An assistant director has also been detailed to the office. This office will augment the growth and expertise of the Military Justice Litigation Career Track by improving the quality of practice, by providing reach-back of technical expertise, and by providing additional career choices for litigation career track officers.

The Director of DCAP works under the direct supervision of Deputy Commander, Naval Legal Service Office (DCOM-NLSO) and serves a supporting role for NLSOs. The DCAP Director supervises only those personnel detailed to DCAP but will assist DCOM-NLSO in the exercise of his oversight and reporting responsibilities. DCAP will provide defense related subject matter expertise and support to NLSO trial defense counsel when requested by trial defense counsel, the NLSO CO, or as directed by DCOM-NLSO. DCAP is available to defense counsel as a resource to assist in defending cases. DCAP may request case specific or other administrative information from trial defense counsel or NLSO COs as necessary to assist in fulfilling its roles and responsibilities.

In addition to establishing DCAP, on 1 October 2010, (CNLSC) stood up the complementary Trial Counsel Assistance Program (TCAP) to support Region Legal Service Offices (RLSOs) by providing advice and assistance to trial counsel, upon request, throughout every phase of court-martial litigation. Service as the military justice subject matter expert on government-related matters for CNLSC, TCAP counsel may be consulted to provide support to trial counsel in all aspects of case preparation, including, but not limited to, drafting charges and specifications, drafting motions, preparing expert witnesses, devising trial strategy, and assisting with post-trial matters.

The Director of TCAP works under the direct supervision of Deputy Commander, Region Legal Service Office (DCOM-NLSO) and serves a supporting role for RLSOs. The TCAP Director supervises only those personnel detailed to TCAP but will assist DCOM-RLSO in the exercise of his oversight and reporting responsibilities. TCAP will provide government related subject matter expertise and support to RLSO trial counsel when requested by trial counsel, the RLSO CO, or as directed by DCOM-RLSO. TCAP is available to government counsel as a resource to assist in the prosecution of cases. TCAP may request case specific or other administrative information from trial counsel or RLSO COs as necessary to assist in fulfilling its roles and responsibilities.

Enclosure (6):  
Improvements Noted



### **IMPROVEMENTS NOTED (Draft report section I.F)**

As noted in this section and throughout the report, the current leadership team is committed to fixing problems and many initiatives have already been completed with many others in progress. Numerous leadership, supervision and oversight initiatives have been very effective in ensuring compliance with post-trial processing, despite the decentralized organization of the Navy and Marine Corps. While the Report does include reference to many of the initiatives undertaken in the last several years to improve the military justice practice, and post-trial processes in particular (Appendix L), it is important to present them in a manner that conveys a comprehensive picture of the current status of Navy and Marine Corps military justice improvements.

Beginning in 2005, prior to the *Moreno* case or the *Foster* case, there were a number of initiatives undertaken to address what had already been recognized as a decline in the military justice practice. Other initiatives followed. These accomplishments represent real, structural and process changes that have resulted in unprecedented success in improving post-trial and appellate processing of courts-martial in the Navy and Marine Corps. A comprehensive list of the numerous initiatives highlighting the commitment to improvement follows.

#### ➤ Personnel Initiatives.

- Trial Advocacy Training is formalized by JAG Instruction (2004)
- Sea Enterprise 2005 studied the trial judiciary and made recommendations for enhancing the efficiency and effectiveness of trial judges
- JAG Corps 2020 Strategic Plan (2006) addressed the overall delivery of military justice services as one of four core competencies. Emphasis was on elevating the level of practice through the institution of a Military Justice Litigation Career Track.
- JAG commissions Defense Pilot Project (2006 – 2009) to explore feasibility of a different command structure than Naval Legal Service Command to more effectively and efficiently address military justice mission.
- 2006 – 2008: JAG increases the number of appellate judges and from 9 to 17; authorizes increase in the number of law clerks, including civilian staff. Continues sufficient appellate government and defense division staffing.
- 2006 – Commander, Naval Legal Service Command commissions Whitney, Bradley & Brown survey on military justice to evaluate case loads and manpower devoted to courts-martial practice.
- 2006 – In partnership with the University of North Carolina, Dr. Dan Cable, initiated military judge quarterly assessments of litigation proficiency (1 year program).
- 2007 – JAG authorizes hiring of civilian deputies for both appellate divisions who were accomplished appellate advocates and attorney supervisors, enhancing subject matter expertise and division stability.
- Military Justice Litigation Career Track (JAGINST 1150.2 of 2007) initial instruction established 49 billets, including CO, XO and military judge billets, and career track requirements.



- 2007 – Upon the recommendation of the JAG, the Chief Judge, Department of the Navy position was approved by SECNAV as one-star “tombstone” billet (retirement eligible in the grade of O-7 following 12 months designated as Assistant Judge Advocate General in the third year of service).
- 2007 – The JAG directed a concentrated effort to revitalize the Criminal Law Division (Code 20). A career military justice litigator and MJLCT Expert was assigned as the Division Director. The staffing and experience level of Code 20 was also progressively increased, including the addition of a second MJLCT Expert and selected O-6 to dramatically increase “reach back” capability for litigators through the development of an extensive community of practice.
- 2007 – The JAG improves training, litigation support and continuity of Code 20 by authorizing the hiring of two civilians: a former civilian prosecutor with over 120 contested jury trials to serve as a deputy director and a sexual assault litigation specialist.
- 2008 – JAG limits detailing of appellate government and defense counsel to service as IAs.
- 2008 – Judicial Screening Board Instruction updated to enhance qualification process for judicial appointments (JAGINST 5817.1C).
- 2008 – JAG establishes the clerk-to-appellate advocate pilot program, in which counsel detailed to appellate government or defense serve one year as a law clerk at the NMCCA.
- 2009 – Military Justice Litigation Career Track instruction (JAGINST 1150.2A) updated to include 52 billets, including CO, XO and military judge billets.
- 2009 – JAG focuses detailing cycle on filling of military justice litigation career track billets, increasing fill-rate from 40% to 57%.
- 2009 – The Navy JAG Reserve program was reorganized into three pillars of support expertise in the new “Reserve Component Judge Advocate Total Force Structure” (JAGINST 1001).
- 2009 – Defense Counsel Assistance Program (DCAP) adopted as JAG 2010 priority action item.
- 2009 – Competitive board selection of first Chief Judge of the Department of the Navy as the capstone for the Military Justice Career Track (MJLCT).
- 2010 – Promotion results for Military Justice Litigation Career Track officers show military justice community practitioners are promoting at or above rates for their peers outside MJLCT: O-6 = 50% of in-zone candidates (1 of 2) and 30% selection above zone (1 of 3); O-5 = 60% in-zone (3 of 5) and 30% above zone (1 of 3); O-4 = 67% in-zone (2 of 3) (there were no above-zone candidates)
- 2010 – JAG commissions second program of quarterly military judge assessments of counsel performance, rolled out in July 2010.
- 2010 – JAG establishes Defense Counsel Assistance Program and O-6 Military Justice Litigation Career Track “Expert” as Director and Chief Defense Counsel of the Navy

- 2010 – JAG establishes Trial Counsel Assistance Program separate from criminal law policy division with O-5 Military Justice Litigation Career Track “Expert” as Director
- 2010 – JAG and Commander, Naval Legal Service Command direct reorganization of Naval Legal Service Command Headquarters to eliminate the single, neutral Vice Commander, and to include two Deputy Commanders, one each for Region Legal Service Offices (prosecutors) and the Naval Legal Service Offices (defense) with authority and resources to actively manage and supervise courts-martial case processes.

➤ Process Initiatives

- 2007 – JAG Memorandum to SJAs dated 23 May 07, regarding unacceptable level of post-trial errors and inclusion of same as Art 6 inspection item; also requested Chief Judge NMCCA to include SJA names in headnotes of court opinions.
- 2007 – JAG directs Lean Six Sigma docketing project to reduce the record of trial receipt process from an average of 17 days to one; and docketing from 8 days to one. Changes in docketing procedures were incorporated in processing instructions and training for Codes 40 and NMCCA docket clerk and panel secretaries.
- 2008 – Cancelled out-of-date JAG INST 5810.1 (Management Goals for Processing Navy Courts-Martial) dated 1984. Timelines no longer reflected complexities and variations in courts-martial practice.
- 2009 – Case Evaluation Project assessed deficiencies in litigation training and performance, with emphasis on sexual assault cases. Made specific curriculum recommendations to the Naval Justice School (NJS).
- 2009 – JAG establishes the Military Justice Oversight Council (MJOC) as a flag/general officer forum for the review of military justice in the Navy and Marine Corps. The MJOC meets monthly to review structural, resource and other matters that affect the timely and effective delivery of military justice services. The MJOC is pending formal designation in a SECNAVINST.
- 2009 – JAG approves reporting “triggers” for military justice cases to be briefed to the MJOC by the cognizant AJAG (Vice Commander, Naval Legal Service Command, AJAG Criminal Law, or Chief Judge). Triggers include Navy cases at 75 days without a CA’s action; JAD monitors CMS to identify and expedite any lagging Marine cases; cases that are not docketed with NMCCA by 150 days. Once at NMCCA, cases are briefed to the MJOC if docketed longer than one year; or in panel longer than 6 months, if appellant is confined. Cases with five enlargements and all mandates are briefed to the MJOC. These triggers are documented in the formal minutes adopted by the MJOC.
- 2009 – Internal operating procedures of NAMARA Code 40 include comprehensive case tracker implemented via Excel spreadsheet, including mandates (the data from the spreadsheets were later incorporated into CMTIS upgrade). RLSC COs and Marine SJAs receive the appellate case tracker and a

report of records of trial received in the previous month to ensure continuity of record control.

- 2009 – Written *DuBay* guidance provided to trial and appellate judges.
- 2009 – JAG directs annual Report on the State of Military Justice. First report compiled in July 2009;
- 2010 – JAG directs a second Report on the State of Military Justice report by 30 November 2010 and submits annual requirement for this report in pending SECNAVINST.
- 2010 – Adopted development of Navy-Marine Corps case tracking system as JAG 2010 priority action item.
- 2010 – JAG cancels bi-annual JAG Corps Seminar and diverts funding to Center for Naval Analysis study of information technology needs
- 2010 – NMCCA promulgates new Rules of Procedure, which regulate the enlargement process, and include published Internal Operating Procedures (IOPs), the only Service court to have such transparency of process.
- 2010 – Marine Corps launches Case Management System (CMS) to facilitate case visibility and management from trial through appeal.
- 2010 – CMTIS updated specifically to enhance post-trial visibility and case tracking; included revised Business Rules that describe and require compliance. Additional updates identified and programmed.

#### ➤ Instructions

- 2009 – JAGINST 1150.2A (MJLCT) designates specific billets be filled with military justice specialists or experts, including 4 judges on the NMCCA, including the Chief Judge.
- 2009 – JAGINST 5814.1 establishes the NMCCA and sets out specific supervisory jurist responsibilities for senior panel judges and the Chief Judge, including active case management, and requirement that all appellate judges attend the Army Military Judge Course.
- 2010 – JAGNOTE 5450 establishes mission and function of Assistant Judge Advocate General, Chief Judge of the Department of the Navy
- 2010 – JAGINST 1320.1 formalizes detailing policy pertaining to military justice billets
- 2010 – JAGINST 5814.1 updated to reflect position and duties of Chief Judge, Department of the Navy as they relate to the NMCCA
- 2010 – JAGINST 5813.4G updated to reflect position and duties of the Chief Judge, Department of the Navy as they relate to the trial judiciary
- 2010 – JAGINST 5813.1A (Standardized Records of Trial) update includes new requirement for FEDEX or equivalent shipping of records of trial and tracking and documentation of receipt at NAMARA; pending signature

Enclosure (7):  
Additional Comments



## ADDITIONAL COMMENTS

The draft DoD IG report contains statements requiring correction or clarification. In addition to those identified elsewhere in our response, the following are noted. Page and paragraph numbers refer to the draft report.

Page 5, first bullet under paragraph I.F says that the Secretary of the Navy created the Chief Judge of the Navy position. This is true; however, the position conceived and proposed by the Judge Advocate General as part of the Navy JAG Corps' strategic plan to address the needs of military justice (JAG Corps 2020). The Secretary of the Navy approved the position as an Assistant Judge Advocate General at the JAG's recommendation.

Page 12, footnote 3 refers to the *Foster* case and states that the Court of Appeals for the Armed Forces (CAAF) found "failure at every level" of military justice. In fact, *Foster* was decided by the Navy and Marine Corps Court of Appeals (NMCCA), which was critical of itself in setting aside the findings and sentence of the trial court. In his concurring opinion, Chief Judge O'Toole found "some responsibility for delayed justice at every level of practice" but noted "it would be unfair to fail to take notice of changes initiated by the Judge Advocate General in response to cases such as this one."

Page 14, fourth paragraph states that, prior to fielding Case Management Tracking Information System (CMTIS) in 2006, the Navy did not have a system to track courts-martial from the field to the court; but in fact Homeport Electronic Legal Management (HELM) was used to track cases prior to fielding CMTIS. (HELM was unsuccessful, which lead to development of CMTIS.)

Page 33, third paragraph, states that Navy and Marine Corps Appellate Review Activity (NAMARA) civilianized the deputy positions. This action was at the direction of the Judge Advocate General and represented a part of a broader effort by the JAG to develop and maintain subject matter expertise and continuity in accomplishing staff work within the Office of the Judge Advocate General, recognizing that active duty officers must rotate on a two or three-year basis.

Page 33, last paragraph, states that "the replacement...was also re-directed to other duties." This is inaccurate. The replacement assumed the duties as assigned in the summer of 2010.

Page 36, fifth paragraph states that Appellate Government Division counsel do not necessarily have military justice experience. This is not true. No accession (first tour) officers are detailed to either appellate division; only counsel with prior service at a Naval Legal Service Office, a Region Legal Service Office, or a Marine Corps Law Center or Legal Service Support Section are assigned to these divisions.

Page 43, fourth paragraph, states that inspections of fleet Judge Advocates have never been done before. Inspections were conducted in 2009 and 2010.

Page 51, seventh paragraph, states that “the cultural paradigm in the Navy tends to be ‘hands off’ and reactive, not a proactive, preventative approach.” This is false. It also states that “Navy JAG leadership” deemed unnecessary a suggestion to include a mention of *Moreno* timelines in a command instruction. The statement is not attributed, so it is unclear who, in the view of the Report, is among the “leadership.” The Judge Advocate General and the Commander, Naval Legal Service Command have made *Moreno* standards a critical part of oversight efforts.



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3000 MARINE CORPS PENTAGON  
WASHINGTON, DC 20350-3000

IN REPLY REFER TO:

5400

CMC

15 Oct 10

From: Commandant of the Marine Corps  
To: Secretary of the Navy

Subj: DOD INSPECTOR GENERAL REPORT "EVALUATION OF POST TRIAL  
REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE  
NAVY"

Encl: (1) SJA to CMC comment on DoD IG report w/ enclosures

1. The enclosure is provided as the Marine Corps' service-specific attachment to your comments on the subject DoD Inspector General's (DoD IG) draft report. We concur generally with the DoD IG's assessment and recommendations regarding the provision of legal services in the Marine Corps and we accept responsibility for the noted deficiencies in the execution and supervision of the Marine Corps legal mission.
2. As described in our recently published Marine Corps Legal Services Strategic Action Plan 2010-2015, we conducted a self assessment of our legal community and arrived at some of the same conclusions as the DoD IG. We immediately began addressing these deficiencies, but more remains to be done.
3. I consider the execution of legal functions a service level responsibility. Moreover, I believe the effective and efficient administration of military justice is critical to the ability of our commanders to maintain good order and discipline and is essential to protect the rights of our Marines and Sailors. To ensure that our legal community has the capability to support commanders in this area and to avoid a recurrence of the deficiencies highlighted in the draft DoD IG Report, I need a Marine officer responsible to the Commandant of the Marine Corps for the supervision of the administration of military justice in our Corps. The officer best positioned to provide that service-level supervision is the Staff Judge Advocate to the Commandant.

  
JAMES T. CONWAY



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3000 MARINE CORPS PENTAGON  
WASHINGTON, DC 20350-3000

IN REPLY REFER TO:  
5400  
SJA  
15 Oct 10

From: Staff Judge Advocate to the Commandant  
To: Commandant of the Marine Corps

Subj: COMMENTS ON THE DOD INSPECTOR GENERAL REPORT "EVALUATION  
OF POST TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE  
DEPARTMENT OF THE NAVY"

Ref: (a) DoD IG Memo of 24 Sep 10

Encl: (1) Factual Inaccuracies in draft DoD IG Report  
(2) Strategic Action Plan 2010-2015 of 15 Aug 10

1. Reference (a) is the Department of Defense Inspector General (DoD IG) draft "Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy." The enclosures are provided as the Marine Corps input to the Department's response. Enclosure (1) corrects factual inaccuracies in the report. Enclosure (2) is the Marine Corps Legal Services Strategic Action Plan 2010-2015.

2. In its draft report, the DoD IG identified a number of Departmental and Service deficiencies that contributed to the mishandling of courts-martial, particularly in the post-trial phase. The report cites failures in the leadership of both the Navy Judge Advocate General's Corps (JAGC) and the U.S. Marine Corps judge advocate community.

3. In their findings on page 2, the DoD IG stated:

Process failures occurred at almost every segment in the post-trial process. They resulted from inadequate leadership, supervision and oversight over organizations suffering from many policy and structural deficiencies, including:

- ineffective tracking systems and absent, or unenforced, processing timelines;
- inadequate policy prescribing expectations and standardized processes, procedures and checklists for processing courts-martial;



Subj: COMMENTS ON THE DOD INSPECTOR GENERAL REPORT "EVALUATION OF POST TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY"

- decentralized organizational structures wherein every legal office or staff judge advocate functions independently without higher headquarters oversight or professional supervision; and
- ineffective inspections, which either did not detect/identify post-trial problems, or did not lead to sufficient or lasting corrective actions.

4. The deficiencies highlighted in reference (a) were apparent and well-documented in appellate case law. In a detailed assessment of the strengths, weaknesses, opportunities, and threats of the Marine legal community conducted in 2009-2010, the Marine Corps reached many of the same conclusions about the effectiveness and efficiency of its Service-level legal mission. The weaknesses identified in our self-assessment were published in enclosure (2) and included:

- Lack of uniformity in policies and procedures for legal services;
- Lack of oversight of the practice of law;
- Lack of formal mechanisms for maintaining military justice expertise; and
- Lack of current doctrine.

The Marine legal community has accepted responsibility for these failures and, when the DOD IG commenced its review, had already begun taking the steps necessary to address these deficiencies and to elevate the practice of law in the Marine Corps. Enclosure (3) sets forth our five strategic goals and some of the initiatives underway to achieve them.

5. To meet the requirement for an effective case tracking system, the Marine Corps developed, tested, and, in February 2010, implemented a Corps-wide Case Management System (CMS) to track cases from the initial request for legal services to docketing at the Navy-Marine Corps Court of Criminal Appeals. Utilizing the same commercial software used by the U.S. Army JAGC, the Marine Corps developed and fielded a system in less than six months. The DoD IG conducted their inspection of CMS within the first four months of implementation and observed the usual challenges that occur during transition to a new system. In spite of these challenges, the DoD IG noted:

Subj: COMMENTS ON THE DOD INSPECTOR GENERAL REPORT "EVALUATION  
OF POST TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE  
DEPARTMENT OF THE NAVY"

The recently-fielded Marine Corps CMS appears to have substantially greater potential than the Navy CMTIS. Specifically, CMS appears to offer better and more complete capability for management to maintain visibility over individual case processing and status in the field, including post-trial processing in the field. (pg 15)

Since the DoD IG inspection, CMS has added additional capabilities and functionality based on user feedback. Through mandatory Corps-wide use, it is now thoroughly tested and provides a reliable and effective tracking system for all Marine court-martial cases until they are docketed by the appellate court. In addition, CMS has the capability to incorporate more advanced features.

6. To meet the requirement for inspections and standardized processes, procedures, and checklists, the Marine Corps instituted a sixteen page checklist for use in the Commanding General's Inspection Program in May 2010. This checklist provides clear standards for our commanders to evaluate the performance of Staff Judge Advocates, Legal Service Support Sections, and Law Centers. To increase the effectiveness of these higher headquarters inspections, a thirty-one page guide was recently published to assist the subject matter experts who conduct these inspections. By establishing clear standards in this format, commanders now have the ability to measure the performance of their legal team through vigorous inspections and enforce these standards by holding them accountable for their performance.

7. The DoD IG Draft report identified a decentralized system of military justice in both the Navy and Marine Corps in which execution of the legal mission, including case tracking and setting and supervision of standards of performance, was done almost entirely at the local level in both services. Decentralized execution is one of the strengths of our two services, but complete decentralization of standards, processes, and procedures results in the kind of inconsistency that leads to the failures documented in the DoD IG Draft Report.

8. In our internal analysis, we drew a conclusion similar to the DoD IG: that our previous failures were due in part to a lack of consistent leadership, oversight, and supervision of the administration of military justice and delivery of legal



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services to our clients. At the local level, commanders and their legal teams are responsible for the execution of military justice. At the department level, the JAG is responsible for the military justice function, including supervision and oversight of the military criminal justice system at the trial and appellate levels. I believe that the deficiencies reported by the DOD IG resulted, in part, from the absence of a legal officer at the Service level within each of the services with the responsibility and authority to supervise the administration of military justice. Each of the services requires a professional legal organization, with service-level legal leadership to meet the unique requirements of their particular service and service culture. The legal leadership of this service organization requires the ability to set uniform service-wide standards, then train to, inspect, and enforce those same standards.

9. This service legal leadership gap has been filled in the U.S. Navy by having the Departmental JAG perform this function. The SJA to CMC's authority to perform this function on behalf of the Commandant is, at best, limited. Statutorily, the SJA to the Commandant is simply that - an SJA, with no specific authority to conduct inspections under Article 6, UCMJ, or to exercise professional leadership and supervision over the Marine legal community. It is my continuing view that there must be a clear line of accountability for the supervision of the administration of military justice and provision of legal assistance. The clearest line of accountability is for the SJA to CMC to be statutorily required, and empowered, to exercise the same functions for Service-wide delivery of legal services as the JAG provides to the U.S. Navy.

10. The Marine Corps accepts responsibility for past failures in execution of the Marine legal mission. With a bias for action, we have begun to implement initiatives to ensure that the mistakes of the past are not repeated. We are committed to elevating the practice of law in the Marine Corps and the Department of the Navy, and will continue setting standards, training to standards, and inspecting to standards. Thank you for the time and attention given to this matter.

  
V. A. ARY

Editorial comments/clarifications to the Draft DoD IG Report

1. Case Management System (CMS) Effectiveness

- a. Statement: "Marine Corps managers and supervisors still do not have the visibility they need from automated systems to monitor case progress and timeliness across the post-trial process." Page 3, paragraph 1.
- b. Comment: The Marine Corps CMS currently provides Marine military justice supervisors with complete visibility of pre-trial and post-trial case loads up until the point the record of trial is docketed by NAMARA and the departmental mission of appellate review begins. NAMARA has access to CMS and updates the appropriate fields upon receipt and docketing of U.S. Marine Corps cases, which notifies Marine personnel when they are mission complete at the service-level. After docketing by NAMARA, Marine military justice supervisors have to contact NAMARA to obtain information about cases.

CMS has the capability to be modified if there are data points military justice managers in the field desire to track. The purpose of CMS is to accurately track Marine Corps cases. Therefore, requests for additional data points are thoroughly evaluated against this purpose prior to implementation of any requested changes.

2. Law Center MCB Quantico

- a. Statement: "A Reserve judge advocate assigned to deal with delay problems after Moreno told us he visited the Legal Services Support Section at Quantico, VA. . . ." Footnote 1, page 3.
- b. Comment: MCB Quantico, VA is an Office of the Staff Judge Advocate, not a Legal Services Support Section. The Legal Services Support Sections are Marine Expeditionary Force organizations that reside in the Marine Logistics Groups located at MCB Camp Pendleton, CA (1st MLG), MCB Camp Lejeune, NC (2d MLG), and MCB Camp Foster, Okinawa, Japan (3d MLG).

3. Inspection Program

- a. Statement: "In addition, Navy inspections have not included Marine Corps Activities, and the Marine Corps has not previously inspected its field activities." Page 4, paragraph 3.
- b. Comment: The Marine Corps recently institutionalized a Commander based inspection program into the functional areas within Staff Judge Advocate Offices, Law Centers, and Legal Service Support Sections. Over the past two decades the SJA to CMC has conducted what are known within the Marine uniformed legal community as Article 6 "visits." These visits were conducted per the inherent authority of the Commandant of the Marine Corps to manage the force and were designed to assess the health of the Marine Corps legal community and address any concerns raised by commands. The SJA to CMC does not have the statutory authority to conduct Article 6, UCMJ inspections and before 2010, the SJA to CMC did not review a standardized inspection checklist while conducting these visits.

Enclosure (1)

4. Inspection Program
  - a. Statement: "[The] Marine Corps is now instituting a comprehensive inspections program." Page 4, paragraph 4.
  - b. Comment: The Marine Corps instituted law center, SJA office, and LSSS inspections as part of the Commanding Generals Inspection Program on 15 May 2010 in MARADMIN 276/10. This inspection includes reviewing the performance of the service-level legal mission using standardized checklists for all practice areas.
5. Marine Corps Responsibility for Article 6 Inspections
  - a. Statement: "The Navy JAG did not typically conduct Article 6 inspections at the Marine Corps units, instead *delegating* the responsibility to the Marine Corps SJA" (emphasis added). Footnote 6, page 13.
  - b. Comment: 'Deferring' may be a more appropriate word than 'delegating.' The Navy JAG did not specifically delegate, but rather deferred this responsibility to the SJA to CMC. Article 6(a) inspections are a statutory responsibility of the JAG per 10 USC § 806(a) that may be delegated by the JAG to "senior members of his staff." The SJA to CMC is a member of the CMC and HQMC staff, not the Navy JAG's staff. Presently, the SJA to CMC performs inspections in the field based upon the inherent command authority of the CMC.
6. Authorized Strength Report
  - a. Statement: "[T]he Marine Corps judge advocate force experienced reductions in authorized strength while incurring increased work requirements and demands for new positions." Page 16, paragraph 4.
  - b. Comment: The Judge Advocate Authorized Strength Report (ASR or billets "purchased" by the Marine Corps) dropped in February 2008, as the Marine Corps was building its end strength to 202,000. The ASR increased again in August 2008 and has remained relatively stable since. The ASR (run twice annually) is the list of billets that is actually "purchased" by the Marine Corps given fiscal realities and funding priorities. Relevant ASR data is as follows:
    - i. August 2007: 311
    - ii. February 2008: 294
    - iii. August 2008: 330
    - iv. February 2009: 367
7. Marine Corps and Navy Are Separate Services
  - a. Statement: "...within an overall context in which the Navy and Marine Corps had the largest courts-martial caseload of any *Service*." (emphasis added) Page 16, paragraph 5.
  - b. Comment: The Navy and Marine Corps have the largest caseload of any department, however, the Navy and Marine Corps are separate services that together comprise the Department of the Navy.
8. Staffing Goals
  - a. Statement: "At the Camp Pendleton Legal Service Support Section, 32 officers were authorized, but only 23 were assigned. Of the 23 officers assigned, 8 were deployed, leaving 17 (53 percent) of 32 authorized officers actually in place to perform the work. Of 56 enlisted authorizations, only 51 members were assigned and 18 of



these were deployed. Only 33 enlisted members (59 percent of authorized) were in place to perform the work. To compensate, five judge advocates had been sent to Pendleton on temporary duty assignments." Page 22, paragraph 1.

- b. Comment: The use of table of organization numbers (T/O) for purposes of determining whether legal personnel were appropriately provided to staff LSSSs, Law Centers and SJA offices does not provide an accurate picture. USMC Manpower relies upon staffing goals (a percentage almost uniformly less than the T/O) in order to determine how many personnel to provide to all Marine units. In April 2010, the LSSS, 1<sup>st</sup> MLG at MCB Camp Pendleton had a staffing goal of 23 officers with 28 on hand. Currently, they have a staffing goal of 25 with 27 on hand. Their enlisted staffing goal is currently 53 with 50 on hand. The LSSS, 2<sup>nd</sup> MLG at MCB Camp Lejeune has an officer staffing goal of 21 with 26 on hand. Their enlisted staffing goal is 49 with 51 on deck.

9. Case Management System Demonstration for the CNA Study

- a. Statement: "A Center for Naval Analyses study is currently reviewing the Judge Advocate General Corps' information technology needs. This study includes benchmarking various other systems against CMTIS to assess options available to the Navy. The Marine Corps is not included in this study." Page 28, paragraph 3.
- b. Comment: CNA requested and received two demonstrations of the Marine Corps' CMS in March and June of 2010.

10. Marine Corps Use of CMTIS

- a. Statement: "The Marine Corps does not use CMTIS, but the military judges who preside over cases after sentencing or acquittal enter a "few case data points" in CMTIS." Page 28, paragraph 5.
- b. Comment: Some Marine military justice personnel do use CMTIS to track Marine cases once after they enter the appellate process at the departmental level at NAMARA or NMCCA. These Marines are granted regional access to "read only" use of CMTIS after a request.

11. Improvements of CMS

- a. Statement: "Based on initial feedback from the field, the Marine Corps CMS has significantly improved Marine Corps visibility over its appellate workload, and the software contractor is continuing additional improvements to meet user needs throughout the Marine Corps." Page 29, paragraph 1.
- b. Comment: It is more accurate to state that the new CMS improves visibility over military justice administration, including post-trial review, at the Service level rather than over its "appellate workload." Post-trial appellate cases which require review under Article 66 or Article 69, UCMJ are tracked by Navy JAG after they are received by NAMARA. The post-trial process at the service-level has been significantly improved by the implementation of the CMS. In particular, the number of cases which exceed the 120 day post-trial Moreno standard for convening authority's action has dropped significantly since CMS was implemented.

12. CMS Tracking

- a. Statement: "The Marine Corps CMS is a field-level tracking system enabling Marine Corps field legal offices to monitor cases in

- progress. The system: ... tracks a case from the date charges are preferred until NAMARA receives the record of trial." Page 29, paragraph 3, bullet 1.
- b. Comment: CMS tracks the Marine cases from the date of a command's request for legal services (RLS) or the date pretrial restraint is imposed (if before an RLS is received). These events occur prior to preferal of charges. Additionally, tracking ends not when NAMARA receives the case but when NAMARA docketts the case.
13. CMS Capabilities
- a. Statement: "The Marine Corps CMS is a field-level tracking system enabling Marine Corps field legal offices to monitor cases in progress. The system: ... does not have capability to calculate elapsed time for individual activities, e.g., the time required to transcribe a record of trial." Page 29, paragraph 3, bullet 3.
- b. Comment: The CMS captures several different data points relating to the time required to perform the service-level mission of post-trial review. For instance, although the exact number of days required to transcribe a record are not currently required to be captured, the amount of time in the Court Reporters office and area of responsibility are captured. Additionally, the time in review, time with trial counsel, military judge, SJAs, and convening authorities are also captured. These data points provide a thorough understanding of the efficiencies of each particular office or officer in performing their functions.
14. LL.M. Designations
- a. Statement: "[T]he Marine Corps has designated 41 positions for individuals with advanced degrees (Master of Laws--LL.M.) in criminal law." Page 42, paragraph 1.
- b. Comment: The Marine Corps has 22 positions coded for individuals with advanced degrees (Master of Laws - LL.M.) in criminal law.
15. LL.M. Positions
- a. Statement: "Individuals in these positions (e.g., Chief Defense Counsel, Senior Trial Counsel, and Defense Counsel) must have these degrees (LL.M.s)." Page 42, paragraph 1.
- b. Comment: As this sentence pertains to the Marine Corps, individuals with LL.Ms are preferred for these positions but not required with exceptions made based on other relevant qualifications.
16. USMC Total Force Structure Division
- a. Statement: "In 2009 and 2010, the Marine Corps TFSD validated a request to re-code approximately 70 judge advocate positions . . ." Page 44, paragraph 6.
- b. Comment: The sentence should read "Between 2008 and 2010, the Marine Corps' Total Force Structure Division (TFSD) validated requests to recode approximately 56 judge advocate positions requiring specialized training and education (Master of Laws degree) in certain legal areas, including military justice."
17. Recoding Positions for LL.M.'s
- a. Statement: "A secondary effect of recoding positions to require a Master of Laws degree was to increase opportunities for judge advocates to receive advanced education, which should elevate legal

- practice throughout the Marine Corps. Fifty-one (51) of 70 validated positions had been approved for re-coding as of June 4, 2010." Page 44, paragraph 7.
- b. Comment: Fifty-six positions will be coded for specialties by 2014.
18. Judge Advocate Targeted Hiring
- a. Statement: "To increase judge advocate inventories, Marine Corps Recruiting Command increased targeted judge advocate hires 71 percent between FY 2008 and FY 2010. The increase was from 30 targeted hires in FY 2008, to 40 in FY 2009, and 60 in FY 2010." Page 44, paragraph 8.
- b. Comment: A more accurate statement would be that the "increase was from 35 targeted accessions in FY 2008, to 45 in FY 2009, to 60 in FY 2010."
19. Authorized End Strength
- a. Statement: There is no number that constitutes authorized end strength. Page 45, table 1.
- b. Comment: There is no "cap" on Marine Corps judge advocate end strength. These numbers were calculated by Judge Advocate Division and reflect the strength required to fulfill the requirements levied by the Marine Corps. This is less than the Grade Adjusted Recapitulation (GAR), which reflects optimal strength.
20. CMS Corrections to Post Trial Process
- a. Statement: "As recently as June 2010, the Navy and Marine Corps were still finding 'lost' cases, which still must work their way through the appellate process." Page 50, paragraph 1.
- b. Comment: This statement is accurate only with respect to cases that began before the implementation of CMS in February 2010 within the Marine Corps legal community; however, with respect to cases initiated after that date, the Marine Corps has visibility over the entire case load managed by our staff judge advocates, law centers, and LSSSs.
21. Misspelling
- a. Statement/Comment: "Maine" on Page 51, paragraph 1 line 1 should read "Marine."
22. Statutory Mission of Judge Advocates
- a. Statement: "Military Justice is the only statutory mission for judge advocates." Page 54, paragraph 4.
- b. Comment: The 2008 NDAA mandates that legal counsel be provided to recovering service members while undergoing evaluation by a physical disability evaluation board and further authorizes Legal Assistance. Another statute, 10 USC § 1044, authorizes legal assistance to be provided by judge advocates.
23. Inspection of Military Justice Administration
- a. Statement: "Inspecting military justice administration in the Marine Corps generally has been delegated to the Marine Corps SJA," Page 64, paragraph 3.
- b. Comment: See Item 7
24. Legal Service Specialists



- a. Statement: "As of May 2010, the Marine Corps had approximately ... 478 legal specialists..." Page 66, paragraph 3.
  - b. Comment: The appropriate title is "legal services specialists."
25. Core Competencies of a Marine Judge Advocate
- a. Statement: "Marine judge advocates are expected to be 'legal generalists' with four corps legal competencies: military justice, operational law, ethics, and fiscal law in contingency operations." Page 66, paragraph 4.
  - b. Comment: The four core competencies that Marine judge advocates are expected to have are generally understood to be military justice, operational law, administrative law (of which ethics regulations are a subset) and legal assistance. Marine judge advocates practicing contract and fiscal law usually have Masters of Law degrees (LL.M.) in contract and fiscal law. They also practice under the supervision of the Counsel for the Commandant (CL).
26. Office of Military Commissions Staffing
- a. Statement: "13 Marine judge advocates were serving as counsel in the Office of Military Commissions..." Page 66, paragraph 4.
  - b. Comment: "Eight active-duty Marine judge advocates."
27. Authorized Strength
- a. Statement: "Current Marine Corps strength is approximately 204,000 Marines, including 390 to 440 judge advocates at any given time. Judge advocate authorized strength has remained fairly static for the last 20 years, while actual judge advocate numbers fluctuated from a 450 high in 1990 to a 360 low in 1999. In 2010, the number is 444, up from 407 and 409 in 2008 and 2009, respectively. Judge advocate authorizations were 393 for FY 2008, increased to 411 and 432 for FYs 2009 and 2010, respectively, and are projected at 448 and 460 for FYs 2011 and 2012, respectively." Page 114, Paragraph 2.
  - b. Comment: See item 21; also, the current active duty judge advocate inventory is 469, including 38 JAs that graduated from Naval Justice School on 8 October 2010.
28. Loss of Judge Advocate Billets
- a. Statement: "In 2001-2002, judge advocates lost 64 positions to other Marine Corps Military Occupation Specialties in the buildup to 202,000 marines. Although a later legislative "plus up" gave the Marine Corps additional authorizations, judge advocates were not "reimbursed" for the loss. When the Military Expeditionary Units were re-coded to have judge advocate billets in their organizations, the judge advocate requirement increased by 7, but judge advocate authorizations were not increased correspondingly. The Military Expeditionary Units simply took the billets from other organizations, generally joint Law Centers and Legal Service Support Sections providing all military justice services." Page 114, paragraph 3.
  - b. Correction: This paragraph is incorrect. Judge Advocates did not lose billets (structure) between 2001 and 2002, and the 202k buildup didn't happen until 2007-2008. Recoding the MEU SJAs as 4405s may eventually drive an increase in accessions, but accession plans are influenced by a host of factors (retirements, funding, etc). Additionally, the MEUs billets were not taken from other

organizations. Judge Advocates served as MEU SJAs, but in billets coded as 8006 (unrestricted officer) or 0530 (civil affairs). The MEU billets have been recoded to 4405 (Master of International Law), and those changes will take effect in 2012.

29. Promotion Rates. In order to clarify the term "Selection Opportunity" and provide missing data points for the table at page 134, Table 1, the following table is provided. It should be noted that percentages may vary greatly year to year for judge advocates at the more senior field grade ranks due to the small zones as illustrated by the number of eligible and selected officers listed below the percentages in the 4402 columns (e.g., FY 11 selection rate for 4402 Colonels was 50% with only 4 eligible officers).

	Major 4402	Major All MOS	Lieutenant Colonel 4402	Lieutenant Colonel All MOS	Colonel 4402	Colonel All MOS	Precept Language
FY11	87.1 % 27/30	82.8 %	81.8% 15/22	65.6%	50.0% 2/4	53.6%	Yes
FY10	90.6 % 29/32	87.6 %	88.9% 16/18	71.8%	64.3% 9/14	53.4%	Yes
FY09	78.4 % 29/32	87.0 %	90.9% 10/11	70.6%	33.3% 4/12	50.5%	Yes
FY08	90.0 % 18/20	87.4 %	82.4% 14/17	65.0%	12.5% 1/8	51.0%	No
FY07	90.0 % 27/30	86.5 %	75.0% 9/12	62.4%	23.5% 4/17	48.4%	No
FY06	92.9 % 26/28	86.7 %	78.9% 15/19	67.2%	80.0% 4/5	50.8%	Yes

FY 05				61.8%		50.4%	No
FY 04				64.7%		51.2%	

## Appendix A. Requirement for DoDIG Review

Senate Report 111-35 (to accompany S. 1390), “Report on the National Defense Authorization Act for 2010” (printing ordered July 2, 2009), directed a DoDIG review, as follows:

### **Inspector General review of post-trial processes for court-martial record preparation and appellate review within the Department of the Navy**

The committee believes that action is long overdue to analyze and correct longstanding problems with the post-trial processes for preparation of records of courts-martial and for appellate review of court-martial convictions within the Department of the Navy. The United States Court of Appeals for the Armed Forces (C.A.A.F.) in the case of *Toohey v. United States*, 60 M.J. 100 (C.A.A.F. 2004), established standards for assessing whether convicted service members had been denied due process under the Fifth Amendment to the Constitution as a result of denial of reasonable appellate processing of their cases. Since then, a succession of Navy and Marine Corps cases, including, but not limited to, *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005); *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006); and, most recently, the unpublished case of *United States v. Foster* have addressed extremely lengthy delays in appellate review. In the *Foster* case, the conviction of a Marine was set aside because his conviction for rape “could not withstand the test for legal and factual sufficiency.” This Marine had been confined for more than 9 years awaiting appellate review of his case. These cases demonstrate that cognizant legal authorities in the Department of the Navy have not taken necessary and appropriate steps to ensure that the resources, command attention, and necessary supervision have been devoted to the task of ensuring that the Navy and Marine Corps post-trial military justice system functions properly in all cases.

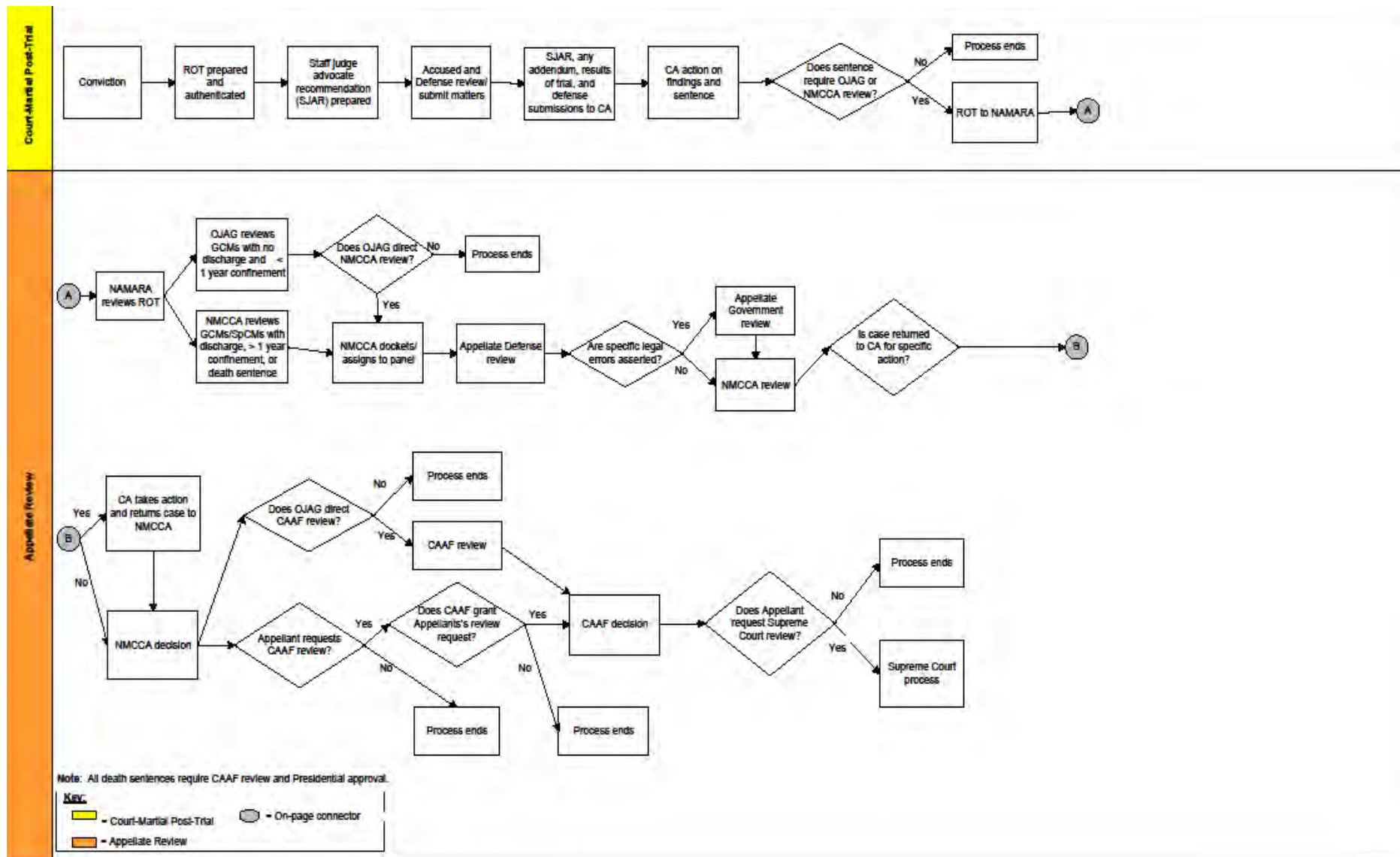
The committee recognizes that a series of Navy Judge Advocates General have attempted to overcome the systemic challenges associated with preparing, authenticating, tracking, and forwarding records of trial from numerous commands entrusted with court-martial convening authority and ensuring that the appellate review process comports with all legal standards. The committee is convinced, however, that intervention is needed by departmental civilian and military leaders to definitively resolve these chronic administrative problems and that action should be taken immediately to resolve these issues.

The committee directs the Inspector General of the Department of Defense, in consultation with the Secretary of the Navy, to review the systems, policies, and procedures currently in use to ensure timely and legally sufficient post-trial review of courts-martial within the Department of the Navy. The review shall discuss and summarize the history of problems experienced by the Navy and Marine Corps since 1990 in ensuring appropriate appellate review of general and special courts-martial and curative measures. The principal focus of the review shall be to determine whether the resources dedicated to post-trial processes, the information and tracking systems in use, the applicable procedures and policies, and the monitoring and supervision of actions of participants in the military justice system aimed at ensuring compliance with the procedural requirements of law are adequate to accomplish the requirements for due process of law under the

Uniform Code of Military Justice and applicable case law. This review should be provided to the Secretary of the Navy no later than January 1, 2010.

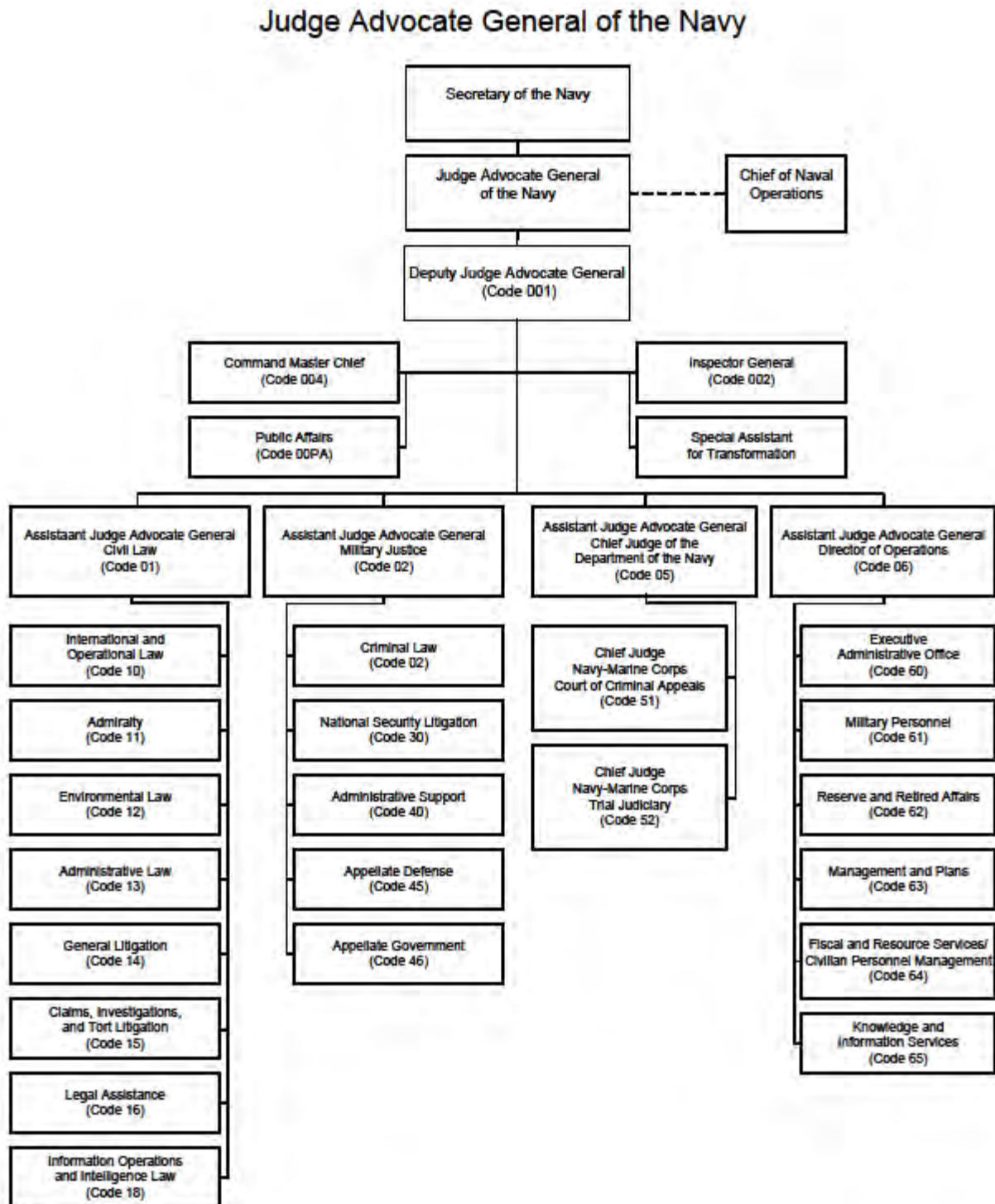
The committee further directs the Secretary of the Navy, in consultation with the Chief of Naval Operations and the Commandant of the Marine Corps, no later than March 1, 2010, to submit to the Committees on Armed Services of the Senate and the House of Representatives a written report on the findings and recommendations of the Department of Defense Inspector General and actions taken or planned to address these findings and recommendations. The Secretary shall include in the report his assessment of the adequacy of (1) the Department of the Navy's processes and resources dedicated to affording legally sufficient post-trial review of all Navy and Marine Corps cases, (2) the systems in place to track courts-martial cases, and (3) means to ensure accountability and compliance with the requirements of the Uniform Code of Military Justice and applicable case law.

## Appendix B. Court-Martial Post-Trial Process (Summary of Major Legal Steps)

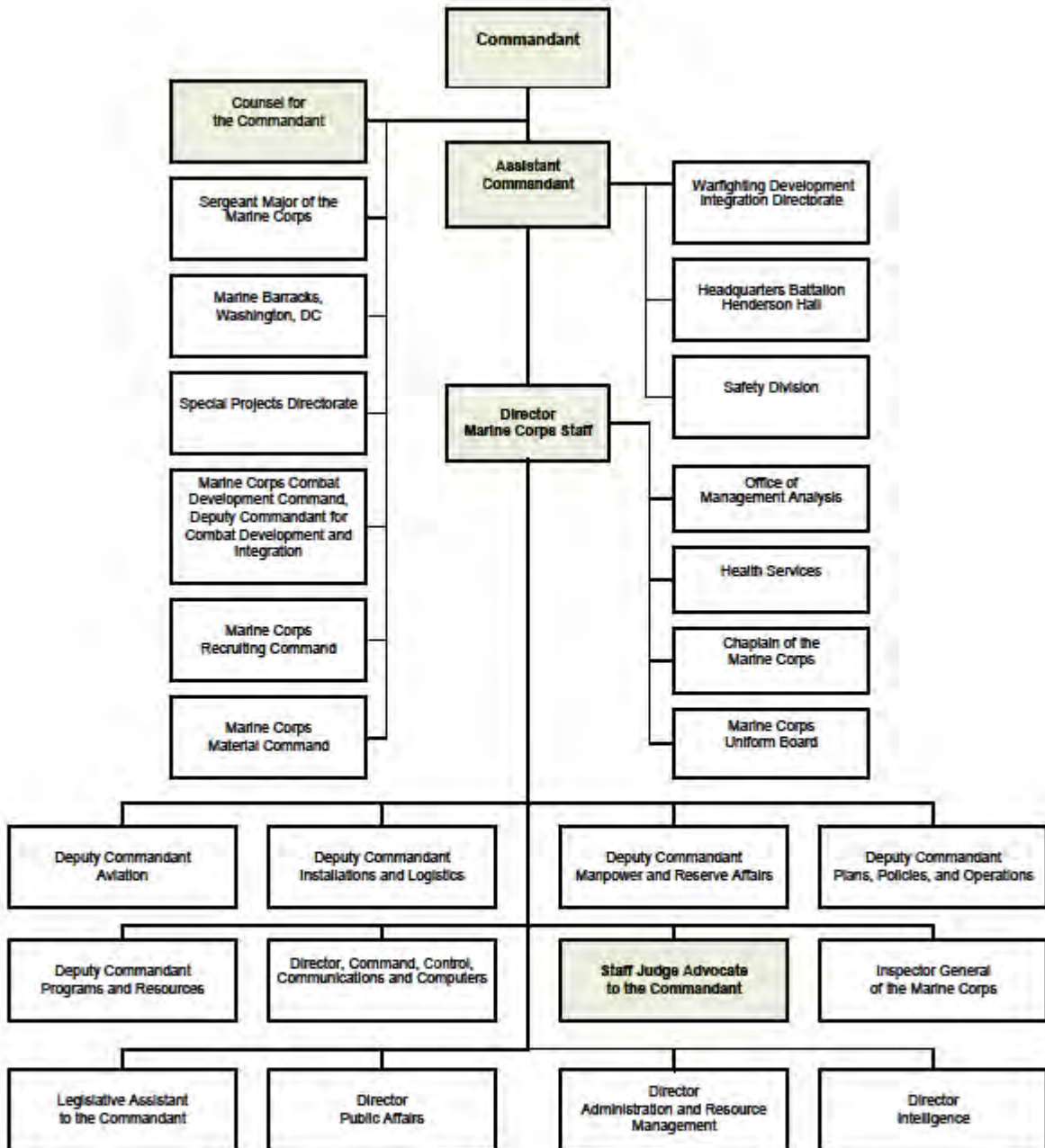




## Appendix C. Navy JAG and Marine Corps Organizations



## Marine Corps





## **Appendix D. Navy and Marine Corps Field and Appellate Organizations**

The Judge Advocate General of the Navy (Navy JAG) heads the Office of the Judge Advocate General, a staff office within the Office of the Secretary of the Navy. The Navy JAG is responsible for delivering legal services in both the Navy and Marine Corps.

The Office of the Judge Advocate General supports the Navy JAG in advising the Secretary of the Navy on legal and policy matters. The office also supports the Navy JAG in advising and assisting the Chief of Naval Operations in formulating and implementing policies and initiatives pertaining to legal services within the Navy. The Deputy Judge Advocate General is also the Commander, Naval Legal Service Command.

The Navy JAG is responsible for the professional supervision of all Navy and Marine Corps judge advocates and for conducting Article 6 inspections of military justice administration in the Navy and Marine Corps. Inspecting military justice administration in the Marine Corps generally has been deferred to the Marine Corps SJA. The Office of the Judge Advocate General organization and the Marine Corps organization are shown in Appendix C.

### **a. Naval Legal Service Command**

The Naval Legal Service Command provides legal services to afloat and ashore commands, active duty naval personnel, family members, retirees, and eligible beneficiaries from other Services, at 99 offices world-wide. The command:

- provides counsel for courts-martial, administrative boards, physical evaluation boards, legal assistance, and local commanders and, through the Region Legal Service Offices, handles post-trial matters for all assigned commands, and provides support to all afloat staff judge advocates and convening authorities as needed;
- provides training for Navy, Marine Corps and Coast Guard judge advocates, legalmen, and other DoD personnel; and
- is the primary sourcing organization for Navy Judge Advocate General Corps' individual augmentation and deployment requirements to support overseas contingency operations.

The Naval Legal Service Command consists of nine Naval Legal Service Offices (NLSOs), nine Region Legal Service Offices (RLSOs), and the Naval Justice School.<sup>21</sup> In FY 2009, the command had 386 judge advocates, 1 Civil Engineer Corps Officer, 10 Limited Duty (Legal) Officers, 213 legalmen, and 210 civilians. During the fiscal year, 15 percent of Naval Legal Service Command's judge advocates deployed as individual augmentees directly supporting overseas conflict operations in Iraq, Afghanistan, Djibouti and Guantanamo Bay, Cuba. The Naval Legal Service Command organization is shown in Appendix E.

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<sup>21</sup> The NLSOs provide defense counsel representing the accused in courts-martial. The RLSOs provide prosecutors/trial counsel representing the Government in courts-martial.

**b. Assistant Judge Advocate General for Military Justice (Code 02)  
and Navy-Marine Corps Appellate Review Activity (NAMARA)**

The Assistant Judge Advocate General for Military Justice (Code 02) is one of four Assistant Judge Advocate Generals who report to the Deputy Judge Advocate General and Navy JAG. The Assistant Judge Advocate General for Military Justice:

- supervises the division director responsible for criminal law policy (Code 20);
- serves as a member, Office of the Judge Advocate General Ethics Committee;
- serves as the Chairman, Judicial Screening Board (JAGINST 5817.1C, January 7, 2008)
- coordinates administrative matters with the Chief Judge, Department of the Navy (Code 05); Chief Judge, Navy-Marine Corps Court of Criminal Appeals (Code 51); and the Chief Judge, Navy-Marine Corps Trial Judiciary (Code 52); and
- is the Officer in Charge, Navy-Marine Corps Appellate Review Activity (NAMARA)

As officer-in-charge, NAMARA, the Assistant Judge Advocate General for Military Justice supervises:

- the Administrative Support Division (Code 40);
- the Appellate Defense Division (Code 45); and
- the Appellate Government Division (Code 46).

***(1) Criminal Law Division***

The Criminal Law Division (Code 20) oversees all aspects of military justice policy in the Department of the Navy. Among its overall responsibilities, the Criminal Law Division reviews for error, and takes action on courts-martial cases involving less severe sentences arising from general court-martial convictions (Article 69 (a), R.C.M 1201(b)). In October 2009 (beginning of the current fiscal year), the Criminal Law Division was staffed with nine employees (seven military and two civilian), including two attorneys, and three legal advisors.

***(2) Navy-Marine Corps Appellate Review Activity (NAMARA)***

NAMARA is the organizational name for the Assistant Judge Advocate General for Military Justice divisions directly involved in receiving, processing and reviewing (substantive legal review) all cases requiring review by the Navy-Marine Corps Court of Criminal Appeals.

***(a) Administrative Support Division***

The Administrative Support Division (Code 40) receives, ensures completeness, and delivers a complete record of trial to the Navy-Marine Corps Court of Criminal Appeals for docketing and appellate review. The Administrative Support Division also receives and reviews general courts-martial records of trial forwarded for mandatory Judge Advocate General review under Article 69(a), when the appellants have not waived or withdrawn their rights to appellate review. In October 2009, the Administrative Support Division was staffed with 10 employees (8 military and 2 civilian), including 2 document examiners and 1 legal technician.

#### (b) Appellate Defense Division

The Appellate Defense Division (Code 45) represents Navy and Marine Corps appellants before the Court, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court, unless the appellant has hired civilian counsel for the representation and/or waived the right to military counsel. After docketing, a court-martial case record is sent to the Appellate Defense Division for examination as to whether any error may have occurred affecting legal or factual sufficiency in the case. As required, the Appellate Defense Division prepares legal briefs outlining asserted errors for the Court's consideration. The Appellate Defense Division also: (1) represents appellants before the Navy Clemency & Parole Board, if the cases are in appellate review and time constraints permit; (2) assists field trial defense counsel in filing extraordinary writs before the Court and the U.S. Court of Appeals for the Armed Forces; (3) provides an informal death penalty assistance team to advise field defense counsel facing potential capital cases; and (4) provides limited, informal advice to field trial defense counsel on specific cases in litigation. In October 2009, the Appellate Defense Division was staffed with 15 employees (10 military and 5 civilian), including 9 defense attorneys and 3 legal technicians.

#### (c) Appellate Government Division

The Appellate Government Division (Code 46) represents the United States in criminal appellate proceedings before the Court, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court. The division also: (1) makes recommendations to the Navy JAG concerning issues to be certified to the U.S. Court of Appeals for the Armed Forces; and (2) provides limited Trial Counsel Assistance Program (TCAP) support to trial counsel and staff judge advocates in the field concerning their representation of the United States in court-martial and post-trial processes. In October 2009, the Appellate Government Division was staffed with 13 employees (10 military and 3 civilian), including 9 government attorneys and 1 legal technician.

### **c. Marine Corps Judge Advocate Organization**

As of May 2010, the Marine Corps had approximately 444 active-duty judge advocates, 340 Reserve judge advocates, 17 warrant officers, 478 legal services specialists, and 41 speech-recognition court reporters. These personnel work in legal offices supporting the Fleet Marine Forces in the continental United States, overseas, and on deployment throughout the world. Marine Corps Reserve judge advocates support offices in all functional areas.

Marine Corps judge advocates are not restricted officers, and may perform duty in various roles outside their occupational specialties. On average, Marine judge advocates serve one to two tours outside the legal profession during a career. Marine judge advocates are expected to be "legal generalists" with four core legal competencies, which are generally understood to be military justice, operational law, administrative law (with ethics regulations as a subset) and legal assistance. Marine judge advocates practicing contract and fiscal law usually have Masters of Law degrees (LL.M.) in contract and fiscal law, and practice under the supervision of the Counsel for the Commandant. In military justice, they serve as prosecutors, defense counsel, military judges, review officers, and appellate counsel for both the Government and Service members. As of March 2010, eight active-duty Marine judge advocates were serving as counsel in the Office of the Military Commissions, the organization authorized under the Military Commissions Acts of 2006 and 2009 to conduct trials for alien unlawful enemy combatants engaged in hostilities against the United States.

Most Marine Corps judge advocates are assigned to operational commands. The military justice mission is highly decentralized and handled by local judge advocate personnel. Legal Service Support Section officers-in-charge, Law Center directors (typically dual-hatted as installation staff judge advocates), Military Justice Officers (supervise Military Justice sections within Legal Service Support Sections and Law Centers), and individual unit staff judge advocates supervise and oversee the delivery of military justice support in the field. Each Legal Service Support Section or installation Law Center serves multiple commanders and staff judge advocates in their respective installations or regions.

The three Marine Expeditionary Forces each has a Legal Service Support Section (located at Camps Pendleton, Lejeune, and Foster (Okinawa, Japan)) providing the bulk of military justice administrative support for the Marine Expeditionary Force. Individual command staff judge advocates within the Marine Expeditionary Force, however, remain the primary legal advisors to their commanders for military justice decisions. Marine law centers are located on other Marine Corps installations, such as air stations, recruit depots, and bases, and provide military justice administrative support at their respective installations.

There is no command or supervisory relationship between the Legal Services Support Section officers-in-charge and the wing/division staff judge advocates they support. The Marine Expeditionary Force staff judge advocate does not have any direct supervisory authority over the Legal Services Support Section, but can work through the Marine Expeditionary Force Commander to secure cooperation from a recalcitrant Legal Support Service Section in a particular matter. Consequently, as in the Navy, most Marine Corps staff judge advocates operate independently and in a highly decentralized manner. There are senior staff judge advocates in the Marine Expeditionary Force structure, but these staff judge advocates are concerned predominantly with operational legal duties, have relatively little military justice involvement, and have no institutional responsibility for overseeing or monitoring military justice activities in subordinate commands.

### ***(1) Prosecution***

Depending on office design, the staff judge advocate, Legal Service Support Section officer-in-charge, or Law Center director is the senior supervisory attorney for the trial counsel. In several offices, an installation Law Center director also acts as staff judge advocate for an installation commander. After staff judge advocates, Law Center directors and Legal Service Support Section officers-in-charge, the Military Justice Officers or legal team officers-in-charge are the mid-level supervisory attorneys for Trial Counsel. Senior trial counsel manage the trial counsel staff below them.

### ***(2) Defense***

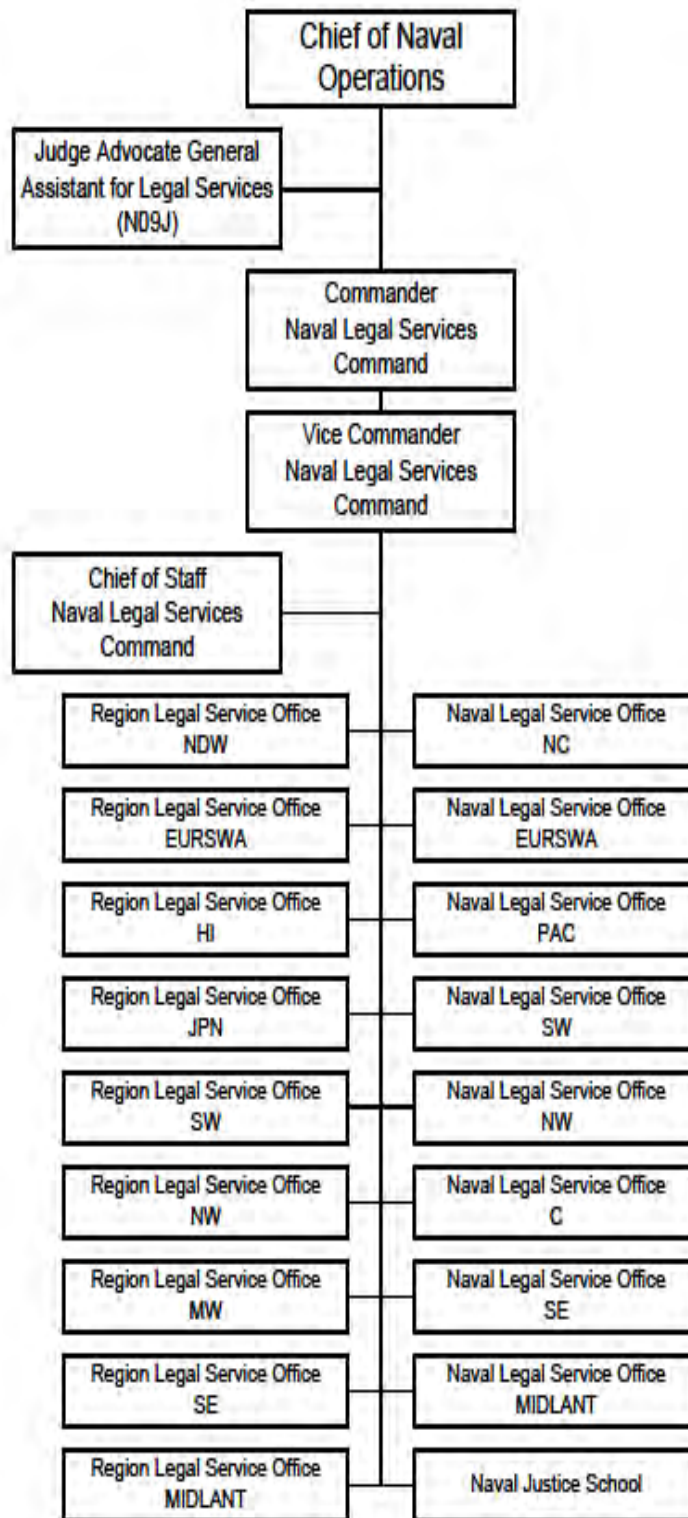
All defense counsel in the Marine Corps fall under the professional supervisory authority of the Chief Defense Counsel of the Marine Corps. In turn, each region in the Marine Corps (East Coast, West Coast, and Pacific) has a Regional Defense Counsel, who acts as the supervisory attorney and fitness report reviewing officer for all defense counsel in the region. The Regional Defense Counsel are attached to the Legal Service Support Sections and report administratively to the Legal Service Support Section officer-in-charge, but receive their fitness reports from the Marine Corps' Chief Defense Counsel. The senior defense counsel at a Legal Service Support Section or Law Center

provides professional supervisory oversight for junior defense counsel (like the senior trial counsel for junior trial counsel).

### ***(3) Post-trial Processing and Review***

The staff judge advocate, Legal Service Support Section officer-in-charge, or Law Center director is the senior supervisory attorney for processing post-trial cases. The Court Reporter Section, led by the Court Reporter Chief, is responsible for preparing and forwarding records of trial to all parties for authentication, and for providing authenticated records of trial to the Review Officer, who runs the Review Section. The Review Section is responsible for judge advocate reviews on cases not forwarded to NAMARA, and for preparing the post-trial documents necessary for cognizant staff judge advocate and convening authority post-trial reviews. The Review Sections are staffed primarily with military enlisted members supervised by a military judge advocate.

## Appendix E. Naval Legal Service Command





## Appendix F. Relevant Professional Standards

The Rules for Professional Conduct require attorney diligence and promptness in executing professional responsibilities. Primary relevant requirements are:

- a judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them (Rule 2.12, ABA Model Code Of Judicial Conduct);
- a judge shall perform judicial and administrative duties competently and diligently (Rule 2.5, ABA Model Code Of Judicial Conduct);
- a lawyer shall act with reasonable diligence and promptness in representing a client (Rule 1.3, ABA Model Rules of Professional Conduct 2004);
- a covered attorney shall provide competent, diligent, and prompt representation to a client (Rule 1.1., Judge Advocate General Instruction (JAGINST) 5803.1B, “Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General,” February 11, 2000, Enclosure (1), “Rules of Professional Conduct”);
- a covered attorney shall act with reasonable diligence and promptness in representing a client (Rule 1.3, JAGINST 5803.1B);
- a covered attorney's workload should be managed by the attorney (and supervisor, if applicable) so that each matter can be handled effectively (Comment (1) to Rule 1.3, JAGINST 5803.1B);
- perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions (Comment (2) to Rule 1.3, JAGINST 5803.1B);
- a covered attorney shall make reasonable efforts to expedite litigation or other proceedings consistent with the interests of the client and the attorney's responsibilities to tribunals (Rule 3.2, Expediting Litigation, JAGINST 5803.1B);
- dilatory practices bring the administration of justice into disrepute (Comment to Rule 3.2, JAGINST 5803.1B).

Furthermore, Rule for Courts-Martial 109, Manual for Courts-Martial, specifies "Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual."

## Appendix G. Relevant Policy and Requirements

- 10 U.S.C. §5148 provides: “(b) . . . The Judge Advocate General shall be appointed . . . from judge advocates of the Navy or the Marine Corps . . . (d)(2) The Judge Advocate General of the Navy, under the direction of the Secretary of the Navy, shall . . . perform the functions and duties and exercise the powers prescribed for the Judge Advocate General in chapter 47 [Uniform Code of Military Justice] of this title . . .”

- Secretary of the Navy Instruction (SECNAVINST) 5430.27C, “Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services,” April 17, 2009. Prescribes the Judge Advocate General of the Navy’s responsibility for supervising certain legal services in the Department of the Navy, including those performed in the Office of the Judge Advocate General, and sets forth responsibilities for the Staff Judge Advocate to the Commandant of the Marine Corps. The Marine Corps must comply with Navy regulations governing military justice activity if promulgated in specific Secretary of the Navy, or Judge Advocate General policy. The Marine Corps is not required to follow instruction from Navy commanders, such as the Commander, Naval Legal Service Command.

- Office of the Chief of Naval Operations Instruction (OPNAVINST) 5810.4/Judge Advocate General Instruction (JAGINST) 5810.1, “Management Goals for Processing Navy Courts-Martial,” September 5, 1984. Contained very specific time goals for processing courts-martial, from first knowledge of an offense through investigation, trial, convening authority action, and thereafter to final appellate review. Effective March 20, 2008, the policy was cancelled at the Judge Advocate General’s request. The Judge Advocate General indicated the Commander, Naval Legal Service Command, now monitors case progress and holds Region Legal Service Office Commanders accountable, thereby eliminating the need for these management goals.

- JAGINST 1150.2A, “Military Justice Litigation Career Track,” June 17, 2009.

- JAGINST 5400.1A, “Office of the Judge Advocate General (OJAG) Organization Manual,” July 6, 1992. Chapter 8 has military justice instructions regarding handling and processing records of trial at the Navy-Marine Corps Appellate Review Activity and the Navy-Marine Corps Court of Criminal Appeals.

- JAGINST 5800.7E, “Manual of the Judge Advocate General (JAGMAN),” June 20, 2007. Implements Uniform Code of Military Justice and Manual for Courts-Martial provisions; designates Navy general and special court-martial convening authorities; specifies a 120-day Moreno timeline for sentencing to convening authority action; references rescinded OPNAVINST 5810.4 for processing time goals; and requires the staff judge advocate to explain a delay exceeding the 120-day goal.

- JAGINST 5803.1C, “Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General,” November 9, 2004. Applicable to both Navy and Marine Corps judge advocates.

- JAGINST 5813.1A, “Standardization of GCM/SpCM [General Court-Martial/Special Court-Martial] Verbatim Records of Trial,” September 17, 1993.

- JAGINST 5813.4G, “Navy-Marine Corps Trial Judiciary,” February 10, 2006. Requires all military trial judges to complete the Military Judge’s Course successfully.

- JAGINST 5814.1, “Navy-Marine Corps Court of Criminal Appeals,” August 3, 2009.

- JAGINST 5817.1C, “Judicial Screening Board,” January 7, 2008.
- JAG/Commander Naval Legal Service Command (JAG/CNLSCINST) 1500.2A, “Trial Advocacy Training,” October 12, 2004.
- Commander, Naval Legal Service Command Instruction (COMNAVLEGSVCCOMINST) 5040.1C, “Command Inspections,” January 30, 2001, Enclosure (3), “Command Inspection Checklist.” Not currently used; checklist in draft revision pending since about 2007 is currently used.<sup>22</sup>
- COMNAVLEGSVCCOMINST 5800.1E, “Naval Legal Service Command (NLSC) Manual,” February 19, 2002. Naval Legal Service Command policy for operating and administering the Naval Legal Service Offices, Trial Service Offices, Naval Justice School, and their respective detachments, branch offices, and satellite offices. The publication does not reflect the current Naval Legal Service Command organization. The Trial Service Offices were disbanded and folded into the Region Legal Service Offices in 2006.
- COMNAVLEGSVCCOMINST 5814.1, “Post-Trial Checklists,” December 2, 1992. In revision; applies to Naval Legal Services Command offices, not the Marine Corps; according to the Judge Advocate General Inspector General, this publication has not been used for several years.
- Marine Corps Administrative Order (MARADMIN) 062/10, “Implementation of Case Management System for Courts-Martial,” February 1, 2010.
- MARADMIN 276/10, “Implementation of Command Inspections of SJA Offices, Law Centers and Legal Service Support Sections,” May 10, 2010.
- Marine Corps Order (MCO) P5800.16a, “Marine Corps Manual For Legal Administration (LEGALADMINMAN),” August 31, 1999.
- Navy-Marine Corps Court of Criminal Appeals (NMCCA) “. . . Rules of Practice and Procedure Including Internal Operating Procedures” (effective February 1, 2010); Rule 23.2., “Motions for Enlargement of Time.” Specifies timelines and requires very explicit justification for time extension requests.
- Criminal Law Division (Code 20) “Newsmailer” 2006-06A, *U.S. v. Moreno* Implications and Guidance. E-mail memorandum in which the Criminal Law Division disseminated the *Moreno* decision; newsmailers are not directive or policy-making in nature.
- Marine Corps Deputy Staff Judge Advocate Memorandum to Field, Subject: “Standards for Court-Martial Post-Trial Processing,” January 9, 2010.

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<sup>22</sup> As we were completing this report, on June 14, 2010, the instruction was published in final form, rescinding COMNAVLEGSVCCOMINST) 5040.1C, “Command Inspections,” January 30, 2001.

## Appendix H. Military Justice Statistics (FY 1990 – FY 2009)

Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudicial Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY '90-FY'09	35,731	100.00%	66,429	100.00%	55,531	100.00%	157,691	100.00%	1,691,810	100.00%	1,849,501	100.00%	68,218	100.00%	71,774	100.00%
USN	5,412	15.15%	21,801	32.82%	20,202	36.38%	47,415	30.07%	408,585	24.15%	456,000	24.66%				
USMC	4,356	12.19%	25,922	39.02%	18,689	33.66%	48,967	31.05%	212,599	12.57%	261,566	14.14%				
Subtotal	9,768	27.34%	47,723	71.84%	38,891	70.03%	96,382	61.12%	621,184	36.72%	717,566	38.80%	38,519	56.46%	40,337	56.20%
USA	16,644	46.58%	10,345	15.57%	14,985	26.98%	41,974	26.62%	896,456	52.99%	938,430	50.74%	18,829	27.60%	20,197	28.14%
USAF	9,319	26.08%	8,361	12.59%	1,655	2.98%	19,335	12.26%	174,170	10.29%	193,505	10.46%	10,870	15.93%	11,240	15.66%
FY 09	1,092	100.00%	1,820	100.00%	2,929	100.00%	5,841	100.00%	65,036	100.00%	70,877	100.00%	1,611	100.00%	1,812	100.00%
USN	94	8.61%	203	11.15%	201	6.86%	498	8.53%	11,145	17.14%	11,643	16.43%				
USMC	140	12.82%	675	37.09%	1670	57.02%	2,485	42.54%	11,772	18.10%	14,257	20.12%				
Subtotal	234	21.43%	878	47.93%	1,871	63.88%	2,983	51.07%	22,917	35.24%	25,900	36.54%	694	43.08%	846	46.69%
USA	638	58.42%	528	29.01%	946	32.30%	2,112	36.16%	35,210	54.14%	37,322	52.66%	590	36.62%	618	34.11%
USAF	220	20.15%	414	22.75%	112	3.82%	746	12.77%	6,909	10.62%	7,655	10.80%	327	20.30%	348	19.21%
FY 08	1,146	100.00%	1,832	100.00%	3,070	100.00%	6,048	100.00%	73,186	100.00%	79,234	100.00%	2,034	100.00%	2,494	100.00%
USN	106	9.25%	292	15.94%	340	11.07%	738	12.20%	11,353	15.51%	12,091	15.26%				
USMC	163	14.22%	692	37.77%	1373	44.72%	2,228	36.84%	10,425	14.24%	12,653	15.97%				
Subtotal	269	23.47%	984	53.71%	1,713	55.80%	2,966	49.04%	21,778	29.76%	24,744	31.23%	852	41.89%	937	37.57%
USA	674	58.81%	488	26.64%	1252	40.78%	2,414	39.91%	44,390	60.65%	46,804	59.07%	867	42.63%	1,167	46.79%
USAF	203	17.71%	360	19.65%	105	3.42%	668	11.04%	7,018	9.59%	7,686	9.70%	315	15.49%	390	15.64%
FY 07	1,345	100.00%	2,156	100.00%	2,876	100.00%	6,377	100.00%	77,024	100.00%	83,401	100.00%	2,268	100.00%	3,398	100.00%
USN	148	11.00%	249	11.55%	243	8.45%	640	10.04%	9,850	12.79%	10,490	12.58%				
USMC	149	11.08%	800	37.11%	1262	43.88%	2,211	34.67%	15,012	19.49%	17,223	20.65%				
Subtotal	297	22.08%	1,049	48.65%	1,505	52.33%	2,851	44.71%	24,862	32.28%	27,713	33.23%	986	43.47%	1,590	46.79%
USA	809	60.15%	635	29.45%	1223	42.52%	2,667	41.82%	45,124	58.58%	47,791	57.30%	917	40.43%	1,268	37.32%
USAF	239	17.77%	472	21.89%	148	5.15%	859	13.47%	7,038	9.14%	7,897	9.47%	365	16.09%	540	15.89%
FY 06	1,368	100.00%	2,333	100.00%	3,069	100.00%	6,770	100.00%	76,510	100.00%	83,280	100.00%	2,972	100.00%	3,845	100.00%
USN	158	11.55%	335	14.36%	527	17.17%	1,020	15.07%	12,863	16.81%	13,883	16.67%				
USMC	120	8.77%	964	41.32%	1262	41.12%	2,346	34.65%	13,217	17.27%	15,563	18.69%				
Subtotal	278	20.32%	1,299	55.68%	1,789	58.29%	3,366	49.72%	26,080	34.09%	29,446	35.36%	1,536	51.68%	1,787	46.48%
USA	749	54.75%	579	24.82%	1140	37.15%	2,468	36.45%	42,814	55.96%	45,282	54.37%	968	32.57%	1,323	34.41%
USAF	341	24.93%	455	19.50%	140	4.56%	936	13.83%	7,616	9.95%	8,552	10.27%	468	15.75%	735	19.12%

Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudicial Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY 05	1,606	100.00%	2,827	100.00%	3,376	100.00%	7,809	100.00%	80,986	100.00%	88,795	100.00%	3,332	100.00%	3,596	100.00%
USN	172	10.71%	473	16.73%	958	28.38%	1,603	20.53%	18,316	22.62%	19,919	22.43%				
USMC	187	11.64%	1,137	40.22%	1,022	30.27%	2,346	30.04%	8,985	11.09%	11,331	12.76%				
Subtotal	359	22.35%	1,610	56.95%	1,980	58.65%	3,949	50.57%	27,301	33.71%	31,250	35.19%	1,835	55.07%	2,088	58.06%
USA	825	51.37%	700	24.76%	1,252	37.09%	2,777	35.56%	45,299	55.93%	48,076	54.14%	954	28.63%	1,032	28.70%
USAF	422	26.28%	517	18.29%	144	4.27%	1,083	13.87%	8,386	10.35%	9,469	10.66%	543	16.30%	476	13.24%
FY 04	1,316	100.00%	3,068	100.00%	2,866	100.00%	7,250	100.00%	80,404	100.00%	87,654	100.00%	2,904	100.00%	3,572	100.00%
USN	163	12.39%	611	19.92%	1,026	35.80%	1,800	24.83%	19,674	24.47%	21,474	24.50%				
USMC	150	11.40%	1,261	41.10%	928	32.38%	2,339	32.26%	8,985	11.17%	11,324	12.92%				
Subtotal	313	23.78%	1,872	61.02%	1,954	68.18%	4,139	57.09%	28,659	35.64%	32,798	37.42%	1,501	51.69%	2,069	57.92%
USA	647	49.16%	682	22.23%	755	26.34%	2,084	28.74%	42,004	52.24%	44,088	50.30%	856	29.48%	976	27.32%
USAF	356	27.05%	514	16.75%	157	5.48%	1,027	14.17%	9,741	12.12%	10,768	12.28%	547	18.84%	527	14.75%
FY 03	1,355	100.00%	2,990	100.00%	2,949	100.00%	7,294	100.00%	81,053	100.00%	88,347	100.00%	3,341	100.00%	3,317	100.00%
USN	170	12.55%	1,036	34.65%	1,208	40.96%	2,414	33.10%	19,770	24.39%	22,184	25.11%				
USMC	145	10.70%	818	27.36%	782	26.52%	1,745	23.92%	8,344	10.29%	10,089	11.42%				
Subtotal	315	23.25%	1,854	62.01%	1,990	67.48%	4,159	57.02%	28,114	34.69%	32,273	36.53%	1,684	50.40%	2,162	65.18%
USA	689	50.85%	665	22.24%	858	29.09%	2,212	30.33%	43,037	53.10%	45,249	51.22%	1,089	32.60%	753	22.70%
USAF	351	25.90%	471	15.75%	101	3.42%	923	12.65%	9,902	12.22%	10,825	12.25%	568	17.00%	402	12.12%
FY 02	1,851	100.00%	3,174	100.00%	3,075	100.00%	8,100	100.00%	81,612	100.00%	89,712	100.00%	3,477	100.00%	3,275	100.00%
USN	276	14.91%	769	24.23%	1,089	35.41%	2,134	26.35%	19,662	24.09%	21,796	24.30%				
USMC	223	12.05%	1,419	44.71%	1,009	32.81%	2,651	32.73%	8,523	10.44%	11,174	12.46%				
Subtotal	499	26.96%	2,188	68.94%	2,098	68.23%	4,785	59.07%	28,185	34.54%	32,970	36.75%	2,010	57.81%	1,926	58.81%
USA	788	42.57%	602	18.97%	858	27.90%	2,248	27.75%	44,318	54.30%	46,566	51.91%	850	24.45%	785	23.97%
USAF	564	30.47%	384	12.10%	119	3.87%	1,067	13.17%	9,109	11.16%	10,176	11.34%	617	17.75%	564	17.22%
FY 01	1,741	100.00%	2,961	100.00%	2,901	100.00%	7,603	100.00%	88,710	100.00%	96,313	100.00%	3,151	100.00%	3,064	100.00%
USN	254	14.59%	751	25.36%	1,066	36.75%	2,071	27.24%	21,670	24.43%	23,741	24.65%				
USMC	227	13.04%	1,513	51.10%	1,037	35.75%	2,777	36.53%	13,351	15.05%	16,128	16.75%				
Subtotal	481	27.63%	2,264	76.46%	2,103	72.49%	4,848	63.76%	35,021	39.48%	39,869	41.40%	1,922	61.00%	1,726	56.33%
USA	770	44.23%	357	12.06%	672	23.16%	1,799	23.66%	45,082	50.82%	46,881	48.68%	721	22.88%	775	25.29%
USAF	490	28.14%	340	11.48%	126	4.34%	956	12.57%	8,607	9.70%	9,563	9.93%	508	16.12%	563	18.37%

Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudicial Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY 00	1,597	100.00%	3,094	100.00%	2,688	100.00%	7,379	100.00%	79,505	100.00%	86,884	100.00%	2,917	100.00%	2,268	100.00%
USN	252	15.78%	755	24.40%	974	36.24%	1,981	26.85%	19,842	24.96%	21,823	25.12%				
USMC	176	11.02%	1,626	52.55%	909	33.82%	2,711	36.74%	9,770	12.29%	12,481	14.37%				
Subtotal	428	26.80%	2,381	76.96%	1,883	70.05%	4,692	63.59%	29,612	37.25%	34,304	39.48%	1,738	59.58%	1,219	53.75%
USA	731	45.77%	393	12.70%	666	24.78%	1,790	24.26%	41,285	51.93%	43,075	49.58%	706	24.20%	660	29.10%
USAF	438	27.43%	320	10.34%	139	5.17%	897	12.16%	8,608	10.83%	9,505	10.94%	473	16.22%	389	17.15%
FY 99	1,507	100.00%	2,867	100.00%	2,143	100.00%	6,517	100.00%	75,687	100.00%	82,204	100.00%	3,013	100.00%	3,116	100.00%
USN	176	11.68%	670	23.37%	628	29.30%	1,474	22.62%	19,658	25.97%	21,132	25.71%				
USMC	173	11.48%	1,432	49.95%	937	43.72%	2,542	39.01%	8,907	11.77%	11,449	13.93%				
Subtotal	349	23.16%	2,102	73.32%	1,565	73.03%	4,016	61.62%	28,565	37.74%	32,581	39.63%	1,684	55.89%	1,894	60.78%
USA	737	48.91%	432	15.07%	487	22.73%	1,656	25.41%	38,879	51.37%	40,535	49.31%	872	28.94%	739	23.72%
USAF	421	27.94%	333	11.61%	91	4.25%	845	12.97%	8,243	10.89%	9,088	11.06%	457	15.17%	483	15.50%
FY 98	1,597	100.00%	2,913	100.00%	2,348	100.00%	6,858	100.00%	80,916	100.00%	87,774	100.00%	3,394	100.00%	3,877	100.00%
USN	247	15.47%	789	27.09%	743	31.64%	1,779	25.94%	21,452	26.51%	23,231	26.47%				
USMC	223	13.96%	1,533	52.63%	1040	44.29%	2,796	40.77%	10,033	12.40%	12,829	14.62%				
Subtotal	470	29.43%	2,322	79.71%	1,783	75.94%	4,575	66.71%	31,485	38.91%	36,060	41.08%	2,163	63.73%	2,518	64.95%
USA	685	42.89%	287	9.85%	489	20.83%	1,461	21.30%	41,447	51.22%	42,908	48.88%	731	21.54%	783	20.20%
USAF	442	27.68%	304	10.44%	76	3.24%	822	11.99%	7,984	9.87%	8,806	10.03%	500	14.73%	576	14.86%
FY 97	1,816	100.00%	3,428	100.00%	2,097	100.00%	7,341	100.00%	82,421	100.00%	89,762	100.00%	3,848	100.00%	3,338	100.00%
USN	280	15.42%	888	25.90%	687	32.76%	1,855	25.27%	22,664	27.50%	24,519	27.32%				
USMC	268	14.76%	1,810	52.80%	944	45.02%	3,022	41.17%	11,369	13.79%	14,391	16.03%				
Subtotal	548	30.18%	2,698	78.70%	1,631	77.78%	4,877	66.44%	34,033	41.29%	38,910	43.35%	2,313	60.11%	2,008	60.16%
USA	741	40.80%	325	9.48%	396	18.88%	1,462	19.92%	39,907	48.42%	41,369	46.09%	922	23.96%	733	21.96%
USAF	527	29.02%	405	11.81%	70	3.34%	1,002	13.65%	8,481	10.29%	9,483	10.56%	613	15.93%	597	17.88%
FY 96	1,835	100.00%	3,544	100.00%	1,872	100.00%	7,251	100.00%	76,626	100.00%	83,877	100.00%	3,471	100.00%	3,718	100.00%
USN	275	14.99%	1,124	31.72%	720	38.46%	2,119	29.22%	22,256	29.04%	24,375	29.06%				
USMC	254	13.84%	1,663	46.92%	869	46.42%	2,786	38.42%	8,649	11.29%	11,435	13.63%				
Subtotal	529	28.83%	2,787	78.64%	1,589	84.88%	4,905	67.65%	30,905	40.33%	35,810	42.69%	2,095	60.36%	2,090	56.21%
USA	789	43.00%	357	10.07%	238	12.71%	1,384	19.09%	36,622	47.79%	38,006	45.31%	806	23.22%	833	22.40%
USAF	517	28.17%	400	11.29%	45	2.40%	962	13.27%	9,099	11.87%	10,061	11.99%	570	16.42%	795	21.38%



Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudicial Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY 95	1,938	100.00%	3,299	100.00%	1,772	100.00%	7,009	100.00%	74,565	100.00%	81,574	100.00%	3,399	100.00%	3,619	100.00%
USN	263	13.57%	1,083	32.83%	1,120	63.21%	2,466	35.18%	21,928	29.41%	24,394	29.90%				
USMC	240	12.38%	1,418	42.98%	313	17.66%	1,971	28.12%	5,705	7.65%	7,676	9.41%				
Subtotal	503	25.95%	2,501	75.81%	1,433	80.87%	4,437	63.30%	27,633	37.06%	32,070	39.31%	2,085	61.34%	2,276	62.89%
USA	825	42.57%	353	10.70%	304	17.16%	1,482	21.14%	38,591	51.75%	40,073	49.12%	810	23.83%	768	21.22%
USAF	610	31.48%	445	13.49%	35	1.98%	1,090	15.55%	8,341	11.19%	9,431	11.56%	504	14.83%	575	15.89%
FY 94	1,917	100.00%	3,316	100.00%	1,822	100.00%	7,055	100.00%	76,949	100.00%	84,004	100.00%	3,244	100.00%	3,824	100.00%
USN	371	19.35%	1,411	42.55%	1,277	70.09%	3,059	43.36%	22,275	28.95%	25,334	30.16%				
USMC	211	11.01%	1,160	34.98%	195	10.70%	1,566	22.20%	5,359	6.96%	6,925	8.24%				
Subtotal	582	30.36%	2,571	77.53%	1,472	80.79%	4,625	65.56%	27,634	35.91%	32,259	38.40%	1,904	58.69%	2,301	60.17%
USA	843	43.97%	377	11.37%	349	19.15%	1,569	22.24%	41,753	54.26%	43,322	51.57%	810	24.97%	924	24.16%
USAF	492	25.67%	368	11.10%	1	0.05%	861	12.20%	7,562	9.83%	8,423	10.03%	530	16.34%	599	15.66%
FY 93	2,224	100.00%	3,766	100.00%	3,268	100.00%	9,258	100.00%	82,284	100.00%	91,542	100.00%	4,061	100.00%	4,542	100.00%
USN	485	21.81%	1,819	48.30%	2,620	80.17%	4,924	53.19%	22,727	27.62%	27,651	30.21%				
USMC	249	11.20%	1,232	32.71%	278	8.51%	1,759	19.00%	7,459	9.06%	9,218	10.07%				
Subtotal	734	33.00%	3,051	81.01%	2,898	88.68%	6,683	72.19%	30,186	36.69%	36,869	40.28%	2,405	59.22%	2,654	58.43%
USA	915	41.14%	372	9.88%	364	11.14%	1,651	17.83%	44,207	53.72%	45,858	50.10%	1,030	25.36%	1,250	27.52%
USAF	575	25.85%	343	9.11%	6	0.18%	924	9.98%	7,891	9.59%	8,815	9.63%	626	15.41%	638	14.05%
FY 92	2,691	100.00%	4,874	100.00%	2,987	100.00%	10,552	100.00%	100,611	100.00%	111,163	100.00%	4,666	100.00%	4,240	100.00%
USN	579	21.52%	2,399	49.22%	1,794	60.06%	4,772	45.22%	28,923	28.75%	33,695	30.31%				
USMC	311	11.56%	1,450	29.75%	500	16.74%	2,261	21.43%	12,299	12.22%	14,560	13.10%				
Subtotal	890	33.07%	3,849	78.97%	2,294	76.80%	7,033	66.65%	41,222	40.97%	48,255	43.41%	2,681	57.46%	2,242	52.88%
USA	1,165	43.29%	613	12.58%	684	22.90%	2,462	23.33%	50,066	49.76%	52,528	47.25%	1,291	27.67%	1,381	32.57%
USAF	636	23.63%	412	8.45%	9	0.30%	1,057	10.02%	9,323	9.27%	10,380	9.34%	694	14.87%	617	14.55%
FY 91	2,601	100.00%	5,504	100.00%	3,366	100.00%	11,471	100.00%	112,612	100.00%	124,083	100.00%	4,731	100.00%	5,155	100.00%
USN	426	16.38%	2,724	49.49%	1,441	42.81%	4,591	40.02%	26,169	23.24%	30,760	24.79%				
USMC	371	14.26%	1,633	29.67%	979	29.08%	2,983	26.00%	15,491	13.76%	18,474	14.89%				
Subtotal	797	30.64%	4,357	79.16%	2,420	71.90%	7,574	66.03%	41,660	36.99%	49,234	39.68%	2,906	61.42%	3,008	58.35%
USA	1,173	45.10%	679	12.34%	931	27.66%	2,783	24.26%	60,269	53.52%	63,052	50.81%	1,280	27.06%	1,526	29.60%
USAF	631	24.26%	468	8.50%	15	0.45%	1,114	9.71%	10,683	9.49%	11,797	9.51%	545	11.52%	621	12.05%

Fiscal Year/ Service	General Courts-Martial		Special Courts-Martial		Summary Courts-Martial		Total Courts-Martial		Nonjudicial Punishment		Total Disciplinary Actions		ROT Received by Service Appellate Courts		Appellate Cases Reviewed by Service Appellate Courts	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FY 90	3,188	100.00%	6,663	100.00%	4,057	100.00%	13,908	100.00%	145,113	100.00%	159,021	100.00%	6,384	100.00%	5,704	100.00%
USN	517	16.22%	3,420	51.33%	1540	37.96%	5,477	39.38%	36,388	25.08%	41,865	26.33%				
USMC	376	11.79%	1,686	25.30%	1380	34.02%	3,442	24.75%	18,944	13.05%	22,386	14.08%				
Subtotal	893	28.01%	5,106	76.63%	2,920	71.97%	8,919	64.13%	55,332	38.13%	64,251	40.40%	3,525	55.22%	2,996	52.52%
USA	1,451	45.51%	921	13.82%	1121	27.63%	3,493	25.12%	76,152	52.48%	79,645	50.08%	1,759	27.55%	1,903	33.36%
USAF	844	26.47%	636	9.55%	16	0.39%	1,496	10.76%	13,629	9.39%	15,125	9.51%	1,100	17.23%	805	14.11%

**Notes:** ROT = Record of Trial; USA = United States Army; USN = United States Navy; USAF = United States Air Force; USMC = United States Marine Corps; Subtotal = Navy and Marine Corps combined, which is the Department of the Navy.

The Department of the Navy provided all the above data, which we generally were able to trace to data reported in the Annual Reports of the Code Committee on Military Justice, the most complete, reliable information available. The Departments of the Army, Navy, and Air Force all report their data for inclusion in the annual code committee reports.

Due to the time involved in completing records of trial and forwarding cases for appellate review, the appellate courts could not be expected to receive all courts-martial appellate cases completed in a fiscal year during the same fiscal year. Similarly, an appellate court could not be expected to complete reviewing all cases received in a fiscal year during the same fiscal year, e.g., each appellate court would have a case inventory at the beginning and end of each fiscal year. In addition, when case backlogs occur and efforts are undertaken to resolve case backlogs as occurred in the Department of the Navy, the number of cases that an appellate court reviews in a fiscal year can significantly exceed the number of cases received in the fiscal year. As can be seen in the table above, over the 20 fiscal years involved, the total number of appellate cases reviewed (71,774) did significantly exceed the total records of trial received (68,218) in those fiscal years. We did not attempt to assess the Army and Air Force data, and the Navy data were inadequate for us to assess case inventories.

## Appendix I. Case Law – Unreasonable Post-Trial Delay

Example military appeals court cases addressing post-trial delay problems are summarized below. These cases illustrate delay problems plaguing the Navy and Marine Corps since at least 1990.

1. *U.S. v. Shely*, 16 M.J. 431 (C.M.A. 1983) (Navy): Sentenced October 1980; 38-page-guilty plea; 439-day delay between sentence and final supervisory authority action in case, "marked by administrative bungling and indifference . . . another of a disturbing number of cases involving intolerable delay in the post-trial processing of courts-martial which have arisen since this court, in *United States v. Banks*, 7 M.J. 92 (C.M.A.1979), withdrew from the 'inflexible application' of the presumption of prejudice from such delay."
2. *U.S. v. Bruton*, 18 M.J. 156 (C.M.A. 1984) (Navy): Sentenced September 1980; 40-page-guilty plea; 299 days to supervisory authority action; lengthy, unexplained delay in staff judge advocate recommendation (SJAR) preparation, which noted no irregularities or errors; in Court comments, Judge Everett stated:

We recognize that the Navy-- the service in which this case arises-- faces special problems in accomplishing appellate review of court-martial convictions. Apparently, there are some 2,200 separate convening authorities in the Navy; and where, as here, the convening authority is the commanding officer of a vessel, the problems are aggravated by mobility. . . . Indeed, the convening authority may be under different supervisory authorities as he sails the seven seas. However, while we are cognizant of special problems in the seagoing services, there is nothing in this record to explain why it took so long for the supervisory authority in this case to act. . . . *Footnote 2:* To its credit, the Navy is attempting to develop an automated information system that will enable it to keep better track of its cases and their status. Hopefully, as this system is put in place, problems like that of the present case will vanish.

3. *U.S. v. Henry*, 40 M.J. 722 (N.M.C.C.A. 1994) (Navy): Sentenced: Sept 1985; Nearly 8 years (2,849 days) elapsed between sentencing and convening authority action due to lost record; convening authority was commanding officer of a deployed Seabee unit; original record of trial was lost, with no explanation as to how it was lost, when it was lost, or why it took so long to realize it was lost. The Court commented:

...we are troubled and frustrated by the frequency that this occurs in spite of repeated condemnations from this Court and the U.S. Court of Military Appeals. There ought to be an effective system in place to monitor the review of courts-martial in the naval service, a type of post-trial "chain of custody" of the case that is centrally controlled. The automated case tracking system mentioned by Chief Judge Everett in *Bruton* . . . was apparently never fully operational, and a new system is still in the process of being established. We recommend that the Judge Advocate General do everything in his power to make this tracking system an effective tool as soon as possible. We also strongly encourage all those responsible for the post-trial processing of Navy and Marine Corps cases not to adopt or adhere to a lackadaisical attitude in completing convening authorities' actions and forwarding records for review because of the lack of a judicially

imposed time deadline. The net result of such an attitude can only be "a loss of respect for military law among Americans, in and out of uniform."

4. *U.S. v. Santoro*, 46 M.J. 344 (C.A.A.F. 1997) (Navy); Sentenced 1988 (date unknown); convening authority action on October 24, 1988; record disappeared for 7 years before Navy realized the Court never received or reviewed the record of trial. Navy initiated a search, but the official record was not located. Audio tapes of the trial proceedings were found, as were the convening authority's action and promulgating order, and an authenticated transcript made from the audio tapes. These records were forwarded to the Court of Criminal Appeals (formerly the Court of Military Review) as the "record" for review.

Eight years after the fact, the judge who tried the case authenticated the transcript of the proceedings presented to the court; however, there was no convening order, charge sheet, or staff judge advocate recommendation (SJAR). All 14 Government exhibits and all 18 defense exhibits were missing.

The Court was outspoken in its criticism, stating:

This is another record of trial reaching us many years after sentence was adjudged in a condition that can only be described as horrible. The fault for the abysmal condition of the record lies at the Government's doorstep, not the appellant's.

For its part, the Government, too, spent considerable effort during oral argument assuring us that the Navy has come to grips with its case-tracking difficulties. Counsel stated: "I can assure the Court as an officer of the Court that there is a case-tracking system in place that is effectively working." In this light, the Government contended that there is no need to "send a message."

No one can take comfort in the delays and defects reflected in this case. These problems arguably operated to deny society a full measure of justice because they left the Court of Criminal Appeals with little choice but to perform radical surgery on the findings and sentence. That result should be incentive enough to correct the problems for the future.

5. *U.S. v. Oakley* (N.M.C.C.A. January 9, 2002) (Marine Corps) (unpublished): 8 months from trial (in 2000) to convening authority action in a 36-page-guilty-plea case. In its decision, the Navy-Marine Corps Court of Criminal Appeals stated ". . . lengthy and unjustified delays by convening authorities and their staff judge advocates in the post- trial processing of court-martial cases continue to be a source of concern on appellate review."
6. *U.S. v. Pursley* (N.M.C.C.A. November 14, 2002) (Navy) (unpublished): Sentenced July 1997; 52-page-guilty plea-case; nearly 4 years (1,415 days) from sentencing to docketing at the Court.
7. *U.S. v. Mahr* (N.M.C.C.A. October 22, 2002) (Marine Corps) (unpublished): over 20 months from sentencing (July 2000) to convening authority action; 2 months from convening authority action to record of trial receipt at the Court.

8. *U.S. v. Jones* (N.M.C.C.A. October 31, 2002) (Marine Corps) (unpublished): 190-page-guilty-plea case; 21 months from sentence to convening authority action; 725 days (about 24 months) from trial (July 2000) to appeal docketing at the Court.
9. *U.S. v. Geter* (N.M.C.C.A. May 30, 2003) (Marine Corps)(unpublished): Sentenced July 10, 1998; guilty plea; 5 months for trial counsel to review 384-page record of trial; record of trial authenticated 7 months later; staff judge advocate recommendation (SJAR) signed 1 year later. Convening authority action 15 months after sentencing; 3 months from convening authority action to docketing at the Court.
10. *U.S. v. Williams* (N.M.C.C.A. May 6, 2003) (Marine Corps) (unpublished): Sentenced July 2000; 3 months for trial defense counsel to receive record; 6 months to staff judge advocate recommendation; 13 months to convening authority action; 14 months from sentencing to docketing at the Court. Problems with original trial defense counsel leaving active duty, and convening authority deployment; record of trial was missing several post-trial documents, but included several post-trial documents from an unrelated case.
11. *U.S. v. Khamsouk*, 58 M.J. 560 (N.M.C.C.A. 2003) (Navy) (unpublished): Sentenced Aug 1997; 13 months for authentication; approximately 20 months from sentencing to CA action.
12. *U.S. v. Urra* (N.M.C.C.A. March 6, 2003) (Marine Corps) (unpublished) Sentenced: August 2000; 72-page-guilty plea; about 1½ years (552 days) from sentencing to docketing; 477 days unexplained delay from trial to convening authority action.
13. *U.S. v. Izquierdo* (N.M.C.C.A. September 9, 2003) (Marine Corps) (unpublished): Sentenced March 1999; 50-page-guilty-plea case; over 1½ years (545 days) from sentencing to Court review.
14. *U.S. v. Freeman* (N.M.C.C.A. December 16, 2004) (Navy) (unpublished): Sentenced July 1997; less than 100 page record of trial; over 5 years from sentencing to convening authority action.
15. *U.S. v. Villareal* (N.M.C.C.A. February 28, 2005) (Marine Corps) (unpublished): Sentenced April 2003; 360 days from trial to staff judge advocate recommendation.
16. *U.S. v. Jones*, 61 M.J. 80 (C.A.A.F. 2005) (Marine Corps): Sentenced January 2000; guilty-plea with pretrial agreement; 36-page record of trial; 55-minute special court-martial; 6 months to transcribe, authenticate, and serve record of trial on trial defense counsel; 66 days more to staff judge advocate recommendation; 265 days after sentencing to serve staff judge advocate recommendation on defense counsel; 290 days from trial to convening authority action; 74 days from convening authority action to record of trial receipt at the Court.
17. *U.S. v. Peltier* (N.M.C.C.A. January 31, 2005) (Marine Corps) (unpublished): Sentenced September 2002; guilty plea with pretrial agreement; unexplained 8 months to send record of trial to Military Judge (authenticated July 2003); another 10 months to staff judge advocate

recommendation (signed May 2004); 22 months from sentencing to docketing at the Court (July 2004).

18. *U.S. v. Farmer* (N.M.C.C.A. September 27, 2005) (Navy) (unpublished): Sentenced June 2002; 6 months from sentencing to convening authority action; more than 2 years (816 days) from convening authority action to docketing at the Court (2 months from record of trial mailing to receipt, and then nearly 3 months from receipt to docketing). The Government asserted administrative oversight and ship workups/deployment as reasons for delay. The Court indicated the reasons did not excuse "routine, nondiscretionary, ministerial" tasks nonperformance, and the excessive delay in mailing the record to the appellate authority was "the least defensible of all."
19. *U.S. v. Clark* (N.M.C.C.A. March 14, 2005) (Marine Corps) (unpublished): Sentenced October 2002; over 500 days from sentencing to convening authority action; unexplained 13-month delay from record of trial authentication to staff judge advocate recommendation (signed March 26, 2004).
20. *U.S. v. Paternoster* (N.M.C.C.A. July 27, 2005) (Marine Corps) (unpublished): Sentenced March 2003; guilty plea; 35 page record of trial; about 2 years from sentencing to docketing; about 4 months from trial until trial defense counsel received the record of trial (according to the staff judge advocate, the review chief was indecisive/confused and did not seek assistance in resolving missing document issues prior to record of trial authentication); 2 months for trial defense counsel to receive the staff judge advocate recommendation (due to counsel transfer); unexplained 490 days from trial defense counsel's record of trial receipt to staff judge advocate recommendation.
21. *U.S. v. Rocha* (N.M.C.C.A. November 17, 2005) (Marine Corps) (unpublished): Sentenced February 2004; 473 days from sentencing to court docketing; 344 days from record of trial authentication to staff judge advocate recommendation. Government attributed delays to multiple staff judge advocate and support deployments to combat and post-war operations in Iraq. The Court concluded the reasons, although compelling, had to be balanced against the appellant's constitutional right to due process.
22. *U.S. v. Childers* (N.M.C.C.A. September 30, 2005) (Marine Corps) (unpublished): Sentenced April 2003; 736 days (about 25 months) from sentencing to docketing at the Court; 15 months from record of trial authentication to staff judge advocate recommendation. The staff judge advocate attributed the delay to multiple Third Marine Aircraft Wing deployments during Operations Enduring Freedom and Iraqi Freedom, resulting in a severe legal staff shortage in the unit.
23. *U.S. v. McElhanon* (N.M.C.C.A. December 19, 2005) (Marine Corps) (unpublished): Sentenced July 2003; 42-page-guilty-plea case; over 21 months from trial to docketed at the Court. The Government attributed the delay to "operational commitments."
24. *U.S. v. Sparks* (N.M.C.C.A. October 17, 2006) (Navy) (unpublished): guilty plea; 76-page record; about 9 years (3,573 days) from sentencing (May 1996) to re-docketing at the Court (March 13, 2006). NAMARA Code 40 first received the case nearly 3 years after convening

authority action on December 2, 1996. On February 15, 2001, the Court ordered a new convening authority action, which was completed roughly 5 years later on January 19, 2006. The case was re-docketed at the Court on March 13, 2006.

25. *U.S. v. Sanford* (N.M.C.C.A. July 10, 2006) (Navy) (unpublished): The Court found the almost 3 years from trial (August 2003) to final briefing before the Court were facially unreasonable, as were the 20 months from docketing to the initial appellant pleadings. The reason for delay was attributed to appellate defense counsel's large caseload. The Court expressed "frustration with the continuing practice of appellate counsel, from both sides of the aisle [appellate defense and government counsel], in making bald assertions regarding workload commitments without providing detailed information regarding case numbers and complexity, work hours, and what efforts have been made to obtain assistance."
26. *U.S. v. Canchola*, 63 M.J. 649 (N.M.C.C.A. 2006) (Marine Corps): Sentenced January 2003; guilty plea; 59-page record of trial; 1,263 days (about 42 months) from sentencing to Court decision; 503 days from record of trial authentication to staff judge advocate recommendation (four pages long, containing nothing unusual). Counsel argued the multiple deployments (convening authorities, staff judge advocates, and support) supporting Operation Enduring Freedom, Operation Iraqi Freedom, and their many follow-on missions caused severe staffing issues affecting the review process. The Court commented a general reliance on budgetary and manpower constraints did not constitute reasonable grounds for delay, or cause this factor to weigh in the Government's favor.
27. *U.S. v. Cooper* (N.M.C.C.A. March 15, 2006) (Navy) (unpublished): Sentenced April 2004; guilty plea; 104-page record of trial; 9 months from trial to staff judge advocate recommendation; 17 months from trial to docketing at the Court. The Court found the more than 1 year delay from court-martial adjournment to docketing at the Court was facially unreasonable. The Government asserted clerical errors in explaining the 9 month delay in mailing the original record of trial for convening authority action, but did not attempt to explain the 7 month delay in mailing the record of trial for court review.
28. *U.S. v. Simon*, 64 M.J. 205 (C.A.A.F. 2006) (Marine Corps): Sentenced October 2002; guilty plea to single charge, 36-page record of trial; 847 days (about 28 months) from sentencing to docketing at the Court; the Court noted the 572 days (about 19 months) from convening authority action to docketing at the Court was the "most glaring deficiency... [t]ransmission of the record of trial from the field to the court is a ministerial act, routinely accomplished in a brief period of time in the absence of special circumstances. There are no special circumstances in this case; indeed, no explanation for the delay has been offered. "
29. *U.S. v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) (Marine Corps): Sentenced September 1999; 208 days for military judge to authenticate 746-page record of trial; 490 days from sentencing to convening authority action; 76 days from convening authority action to docketing at the Court; the Court granted 18 time extensions to defense counsel—defense brief was filed 702 days after docketing; the Government's answer brief was 223 days after the defense brief; the Court issued its unpublished decision 197 days later; 1,688 days (4 years, 7 months, 14 days) from trial to complete Moreno's appeal right under Article 66, UCMJ, 10 U.S.C. 866.



The U.S. Court of Appeals for the Armed Forces commented:

490 days between the end of trial and the convening authority's action is excessive; 76 days between action and docketing is also unexplained; longest delay in this case -- 925 days -- involves the period from which the case was docketed at the Court of Criminal Appeals until briefing was complete; CCA granted eighteen enlargements of time; enlargement numbers four through eighteen each contained the same reason for the request: "other case load commitments." "Other case load commitments" logically reflects that Moreno's case was not getting counsel's professional attention, a fact that is the very antithesis of any benefit to Moreno. . . . As we said in *Diaz*, 59 M.J. at 38: Appellate counsel caseloads are a result of management and administrative priorities and as such...while appellate defense counsel's caseload is the underlying cause of much of this period of delay, responsibility for this portion of the delay and the burden placed upon appellate defense counsel initially rests with the Government. The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation. See Article 70, UCMJ, 10 U.S.C. 870 (2000). Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals. Therefore, we decline to hold Moreno responsible for the lack of "institutional vigilance" which should have been exercised in this case.

Comments regarding post-trial processing standards in the military justice system:

Our concern for post-trial timeliness has been heightened by the number of appellate delay cases that have come before this court and cases that are pending elsewhere in the military justice system. In recognition of the due process issues involved in timely post-trial review and appeal and in response to the cases giving rise to our concerns, we will establish post-trial processing standards to be applied to cases yet to enter the post-trial and appellate processes. Unfortunately, our confidence that procedural protections would suffice to ensure the speedy post-trial and appellate rights of service members has been eroded. It is of some concern that the Government brief asserts that the 1,688 day delay in this case was reasonable. We reject that contention and note that Moreno's case is not an isolated case that involves excessive post-trial delay issues.

This increase in processing time stands in contrast to the lower number of cases tried in the military justice system in recent years. Our separate system of military justice often provides different or diminished constitutional rights in light of the need for prompt disposition of disciplinary matters. It follows then, as this court has noted, that the unique nature of review under Article 66(c), UCMJ, "calls for, if anything, even greater diligence and timeliness than is found in the civilian system." *Diaz*, 59 M.J. at 39.

Processing standards adopted:

. . . we will apply a presumption of unreasonable delay . . . where the action of the convening authority is not taken within 120 days of the completion of trial.

We will apply a similar presumption of unreasonable delay for courts-martial completed thirty days after the date of this opinion where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action.

For those cases arriving at the service Courts of Criminal Appeals thirty days after the date of this decision, we will apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals

30. *U.S. v. Simmons* (N.M.C.C.A. November 8, 2006) (Marine Corps) (unpublished): Sentenced April 2001; guilty-plea case; 112-page record of trial; more than 2 years from sentencing to docketing at the Court; 140 days from record of trial authentication to sentencing; 538 days (about 18 months) from sentencing to final staff judge advocate recommendation; 605 days (about 20 months) from trial to convening authority action.
31. *U.S. v. Sands* (N.M.C.C.A. October 25, 2006) (Marine Corps) (unpublished): Sentenced June 2004; guilty-plea case; 46-page record of trial; 667 days (about 22 months) from trial to docketing at the Court; 164 days (about 6 months) from trial to record of trial authentication; 369 days (about 12 months) from record of trial authentication to staff judge advocate recommendation; 134 days (about 5 months) from convening authority action to docketing at the Court.<sup>23</sup> The Marine Corps review officer attributed the delay to war-time operational requirements impacting the 1st Marine Division, and particularly the personnel normally assigned to perform post-trial review. The Court concluded the explanation failed to show reasons for the delay, was "more an exercise in obfuscation than explanation," and showed the Government decided to expend resources on courts-martial, but radically reduced the resources required for timely post-trial review in the same cases (manpower reduced 70 percent). The Court's discussion is noteworthy:

None of the agreements relating to actions on courts-martial are appended to the declaration or the record of trial. None of the general officers referred to in the declaration was the commanding officer who convened this special court-martial and took action in this case. The declaration provides no explanation for the delay of five months from trial to authentication by the military judge. It does not state whether this case was one of the 31 cases received by his office from Twenty-Nine Palms on 15 June 2005. It does not state this case was affected by any confusion between the legal offices on the two bases. The declaration does not say why it took one year after authentication of the record to draft a SJAR. It does not attempt to explain the delay of five months in executing the simple ministerial task of sending the record to this court after the convening authority's action was completed.

While this declaration is notable for what it does not say, what it does say is important. It states that the Marine Corps reduced by 70% the staffing available for post-trial review mandated by law, yet continued unabated the number of courts-martial tried. The war may explain why certain individuals were actually overwhelmed at certain periods (although there is insufficient evidence in this

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<sup>23</sup> The Court identified the total delay as 687 days.

record to prove such a claim, and none are identified). However, it does not explain why the Government did not provide the appropriate resources to ensure the timely and efficient operation of this phase of the military justice system during periods of military operations. This Marine Corps command appears able to prosecute criminal cases through courts-martial during the current war, yet seeks to avoid the negative consequences when it is less diligent in implementing those post-trial procedures which are designed to protect the rights of convicted service members, and which are required by law. In none of the post-trial delay cases this court has seen has the Government even attempted to explain the disparity between assets made available for trial of courts-martial and the assets made available for their post-trial review. It has not done so here.

We are not here questioning the discretion of military commanders on which cases to refer to court-martial, either generally or under the specific facts of this case. However, we emphasize that if commanders exercise their discretion to refer a case to court-martial, they assume, by requirement of law, the duty to provide appropriate and timely post-trial processing

32. *U.S. v. Bush* 68 M.J. 96 (C.A.A.F. 2009) (Marine Corps): Sentenced January 2000; guilty-plea case; 143-page record of trial; more than 7 years from sentencing to docketing at the Court.

## **Appendix J. O'Toole Report-Consolidated Recommendations**

### **Part I**

1. Coordinate and implement the Naval Justice School curriculum changes described in Appendix.
2. Continue to implement, evaluate, and adjust the Military Justice Litigation Career Track as part of *JAG Corps 2020*, with particular emphasis on filling coded billets within NLSC and the judiciary.

### **Part II**

1. To reduce the potential for conflict of interest within Code 20 when providing technical assistance to both trial and defense counsel, and to make “reach back” expertise as accessible to the defense as to the prosecution, explore development of a Defense Counsel Assistance Program (DCAP), or its equivalent.
2. Expand the pool of candidates for judicial selection through more aggressive recruiting among MJLCT officers, and develop a pool of screened officers from which detailers may make assignments.
3. Commission a follow-on to the 2006 survey of military judges and supervisory counsel to assess the relative level of litigation competence.
4. Code 20, and the Chief Judge, NMTJ, should determine the best process for providing additional guidance, respectively, to counsel and military judges in conducting *Dubay* hearings.

### **Part III**

1. Update the NLSC Manual and the JAGMAN to require:
  - a. That all records of trial be forwarded to NAMARA by a servicing RLSO or LSSS;
  - b. That all mandates must be forwarded by NAMARA to a convening authority through a servicing RLSO or LSSS; and that, upon completion of mandated action, a response to the mandate must be returned to NAMARA through the same servicing RLSO or LSSS.
2. Institutionalize current NAMARA procedures for tracking and oversight of cases and mandates in an organizational instruction, identifying responsible officials and parameters within which matters must be brought to the attention of the AJAGs or the JAG.

3. Explore feasibility of a uniform method for RLSO tracking of the post-trial process, and if feasible, include it in the NLSC manual; and
4. Consider repromulgation of joint JAG instructions with the CNO, and the Commandant of the Marine Corps, re-establishing post-trial processing guidelines, and providing new post-trial checklists and templates for required documentation.
5. Incorporate the format of the new NAMARA post-trial case and mandate tracking spreadsheets into a standard CMTIS report.
6. Explore having the Marine Corps use CMTIS or join the Navy in implementing an alternative case management information system, such as the federal court PACER system.

#### **Part IV**

1. Unless the case load remains stable for a prolonged period at below 1,000 cases, the NMCCA should be maintained at 10 active duty judges, including three panels of three judges each, plus the Chief Judge, who should not be on a regularly designated panel.
2. NMCCA must maintain a mix of SJAs and former trial judges to competently address some of the complex issues that arise during trial and post-trial. At least one-third of the panel appellate judges should be former trial judges and/or MJLCT officers.
3. Applicants must apply to the Judicial Screening Board and be selected for service on the bench. Detailing should then be done from the pool of eligible candidates.
4. All appellate judges must attend the Army-sponsored Military Judges Course in Charlottesville, and then maintain a continuing judicial education regime.
5. Active case management must be a clearly designated responsibility of the Chief Judge and the senior judges of the court.

## **Appendix K. History of Problems and Attempted Corrections**

Our evaluation revealed process failures in virtually every segment of the post-trial process. We found systemic problems or structures contributing to the problems, as follows.

### **a. Navy Field Organization**

Decentralized operations, which are hallmarks in both the Navy and Marine Corps, have impacted delivering military justice services. Historically, Navy lieutenants (O-3s) and lieutenant commanders (O-4s) were assigned as staff judge advocates to individual units and installations, both ashore and afloat. More senior officers were assigned as staff judge advocates to operational and flag staffs.

The staff judge advocates were all totally "independent" in that no supervisory legal organization reviewed or monitored their work, or the quality of their legal advice. Most junior staff judge advocates could coordinate with prosecutors and more senior staff judge advocates; however, many were geographically remote and did not have easy access to assistance. Depending on their respective geographic locations, there was an informal oversight capability under which more senior staff judge advocates could assist junior staff judge advocate colleagues, but that capability depended on individual initiative.

In addition, the fidelity of the legal advice rendered depended on the staff judge advocate's training and often limited experience with potentially serious, complex fact patterns. Commands without staff judge advocates received legal advice, including military justice advice, from a Naval Legal Service Command office on an as-needed basis.

In this decentralized structure and under practices existing at the time, courts-martial documents typically flowed directly to and from commanding officers without necessarily passing through a staff judge advocate or legal organization. Depending on the legal expertise available to the commanding officer (and the commander or staff's awareness), the legal officer or staff judge advocate's assistance might or might not have been sought to ensure proper processing.

It was not uncommon for court-martial documents requiring action to be filed and forgotten. One individual we interviewed recalled that, on occasion, records were not found until a ship was decommissioned and its contents removed. This decentralized structure and informal command processing significantly increased lost record incidents and post-trial processing delays. The Navy JAG addressed this problem directly in 2005, directing that all records of trial and court-martial related documents must be transmitted through supporting legal offices.

Reorganizations in 1997 and 2006 addressed some structural problems impacting legal services delivery, but did not resolve all the problems. Prior to 1997, the Naval Legal Service Command (through Naval Legal Service Offices) was responsible for providing command advisory, prosecution and defense services to commands without staff judge advocates. Both the Congress and American Bar Association raised ethical concerns about prosecution and defense counsel being assigned to the same command, under the same commanding officer, and in the same physical location.

To remedy the ethical concerns, in 1997, the Naval Legal Service Command was reorganized, moving the prosecution and command advisory functions to a new organization, the Trial Service Offices. In 2006, the Trial Service Offices were reorganized and realigned within the Commander, Navy Installation Command Navy Region construct. Trial Service Offices were renamed Region Legal Service Offices.

Consistent with consolidating assets within functional areas, which is a principal driver in the regionalization concept, the Region Legal Service Offices acquired all the installation staff judge advocates and their responsibilities. Under the new organization, installation staff judge advocates were no longer independent or isolated; they were incorporated into and supported by the responsible Region Legal Service Offices and its chain of command.

Prior to the 2006 reorganization, there was no supervisory or "parent" organization to which any staff judge advocate, either ashore or afloat, could turn for advice or assistance. Correspondingly, there was no supervisory organization tracking or overseeing post-trial processing at the field staff judge advocate and convening authority levels. The Navy was essentially blind when it came to the state of military justice administration Navy-wide.

Following the 2006 reorganization, although convening authorities resident in the shore infrastructure were now aligned with Region Legal Service Offices for post-trial processing, many operational units, commanders, Fleet, and other nonshore-based convening authorities were not. Independent staff judge advocates continued to serve these organizational elements and commanders.

To improve support and bring more oversight to the post-trial process, in 2005, the Navy JAG directed the new Region Legal Service Offices to track and retain control over records of trial until convening authority actions were completed and the records were received at NAMARA. This direction included records from afloat commands with independent staff judge advocates.

We visited the Mid-Atlantic Region Legal Service Office, Norfolk, Naval Air Station, Virginia, and the Southwest Region Legal Service Office, San Diego Metro, San Diego, California, to examine in more detail how field organizations process courts-martial, both currently and in the past.

Historically, there has been no Navy-wide standard for post-trial processing. The offices we visited used internally-developed operating procedures to manage their cases. Since 2006, they generally used the *Moreno* guidelines to gauge case timeliness, and Appendix 14, Manual for Courts-Martial, to guide them in assembling records of trial for delivery to NAMARA. After the CMTIS was fielded in October 2006, they began entering basic case data in CMTIS, but typically maintained separate, in-house systems/mechanisms to track their cases and actions on cases. The CMTIS still does not capture all the data they need/want for case monitoring.

After the Region Legal Service Offices were established, they began asserting control over records of trial and actively engaging in the post-trial process. Most post-trial processing now takes place in the Region Legal Service Offices, or with their oversight, which has improved post-trial processing and case management. However, there still is no uniform set of procedures



or checklists that govern post-trial review (except for overall guidance in the Uniform Code of Military Justice and the Manual for Courts-Martial).

Procedures, systems and processes remain inconsistent and ad-hoc across the Region Legal Service Offices. Additionally, the Naval Legal Service Command did not have meaningful visibility over field processes or processing time until CMTIS began maturing after it was fielded in October 2006. The CMTIS, however, still does not provide complete visibility for either field or headquarters units.

### **b. Marine Corps Field Organization**

Like the Navy, military justice in the Marine Corps is largely decentralized at the local judge advocate level. Staff judge advocates, Legal Service Support Section officers-in-charge, and Law Center directors (in their capacity as installation staff judge advocates) supervise and oversee the delivery of military justice support in the field.

Each Legal Service Support Section and installation law center serves multiple commanders and staff judge advocates in their respective installations or regions. This organization has remained relatively unchanged since the late 1960s.

Unlike the Army and Air Force where superior headquarters' staff judge advocates oversee and monitor military justice administration in the field, there has never been a formal or informal professional supervisory chain in the Marine Corps. Furthermore, unlike the senior legal officers in the Army, Navy, Air Force and Coast Guard, the Marine Corps SJA does not have authority under Article 6, Uniform Code of Military Justice, to oversee military justice administration in Marine Corps field units.

Further, the Marine Corps SJA does not have professional supervisory authority over Marine judge advocates. The Navy JAG is responsible for professional supervision and military justice administration in both the Navy and Marine Corps. However, history suggests that the Navy JAG is somewhat removed from matters in the Marine Corps judge advocate community. We did not find any evidence that the Navy JAG acted or intervened directly to address the Marine Corps' significant post-trial delay problems between 1990 and 2009.

In the last two decades, military justice supervision in the field has been a function exercised solely by field-level supervisors. There was no tracking system affording Service-wide visibility, and there was no higher-level supervisory authority in either the Navy or Marine Corps routinely monitoring or attending to justice administration in the field.

Field military justice practitioners could receive support, resources and advice informally from the Military Law Branch within the Judge Advocate Division at Marine Corps headquarters, and from the Marine Corps SJA. In addition, the Military Law Branch reviewed high visibility and officer misconduct cases on behalf of the Commandant of the Marine Corps, and prepared monthly reports based on the reviews. However, these capabilities and activities did not compensate for the inadequate oversight capability that permitted post-trial delay problems.

A senior Marine Corps official told us post-trial process efficiency has been almost entirely “personality” dependent. Efficiency depended on individual field staff judge advocates and their abilities and willingness to manage cases after trial, through the post-trial review process, and ultimately ensure case delivery to NAMARA.

Prior to *Moreno*, staff judge advocates focused largely on getting cases to sentencing, without much consideration to timely, accurate, or efficient post-trial processing, or case tracking. A senior official told us he personally witnessed this “failure” when stationed as the staff judge advocate at 29 Palms, California.

Almost 3 months after arriving there, he had not received a single record of trial for review. Upon investigating the cause, he discovered records of trial in the Review Office that were in various stages of review, with no one actively tracking case progress. He appointed an officer to take charge of the review process, eliminate the backlog, and ensure all future records of trial were finished, mailed, and received at NAMARA within 120 days.

He also created an internal tracking system to ensure records were not lost during mail delivery to various commands for action. This initiative, however, was an individual effort and continuation was not assured when a replacement staff judge advocate arrived for duty. At the time, nothing compelled individual staff judge advocates to ensure efficient processing, and there was no system allowing leadership at any level in the Navy or Marine Corps to monitor the overall court-martial progress and ensure field processes worked.

In addition, the senior official noted that “review officer” billets at the field level (those responsible for post-trial functions) were often staffed with inexperienced enlisted Marines, some with little or no formal post-trial review training, or Marine judge advocates not motivated to perform the rather laborious post-trial review job. He opined that post-trial review is neither glamorous nor motivating to judge advocates. They would rather try cases than read records of trial and prepare documents in the post-trial review process.

Another Marine official remarked that upon arriving at the Quantico, VA, Law Center in the 2003-2006 timeframe, there was a huge post-trial backlog. Records of trial languished because no one was tracking them and there was no uniform system to do so.. To resolve the backlog, the Law Center eventually hired a civilian employee to oversee post-trial processing. The current Marine Corps SJA told us he, when Law Center Director at the Miramar Naval Air Station in California, had to use eight separate reports to gain needed visibility over military justice processing in the Law Center.

In summary, the Marine Corps organizational structure for delivering legal services continues not to have functional supervision, oversight, or visibility.

### **c. Command Billets**

Historically, Navy judge advocates serving as commanding officers and executive officers were selected based on their experience and leadership capabilities, because the organizations they would command had broad missions and a significant junior officer training and development responsibility. Although military justice is a statutory mission and core capability, many

commanding officers and executive officers at Navy Legal Service Offices and Region Legal Service Offices did not have significant military justice experience. Consequently, they were not ideally suited to helping train or develop either trial or defense counsel as military justice litigators.

Officers selected for command were generally those who had achieved high success in a range of positions with increasing responsibility, but generally not litigation positions. Military justice and litigation were generally not perceived as career enhancing. As a result, a disproportionate number of senior officers considered and selected for command had not spent significant time in military justice litigation or administration. Rather, they had successful operational or international law careers. Many were selected for command as a step to competing for flag rank.

Adding to the problem was a growing misalignment between the assumptions underlying the Commanding Officer/ Executive Officer detailing policy and the evolving Naval Legal Service Command needs. With the Region Legal Service Offices formation, the former Trial Service Office mission was broadened somewhat to include installation legal advice, but the offices remained predominantly command services and prosecution oriented.

As commands under the Naval Legal Service Command evolved into smaller, more specialized organizations with military justice as a larger mission component, the previous personnel detailing policy did not evolve to address the changing skill sets required for the leaders. Commanding officers were still selected based predominantly on the perception they would lead large organizations with multiple components, and because a command tour was necessary to attain flag rank.

#### **d. Navy Case Tracking**

Prior to October 2006, the Naval Legal Service Command, NAMARA, and the Court all used different information systems to meet their individual needs. Naval Legal Service Command systems primarily tracked the time devoted to courts-martial and other activities, but not individual cases, or case status. Case tracking was left to individual, local field office systems and mechanisms maintained at the individual Region Legal Service Offices, Navy Legal Service Offices, or their predecessor organizations.

In 2005, the Commander, Naval Legal Service Command, first directed local field office commanders to begin tracking their cases until NAMARA received the records of trial. Even with this change, case tracking responsibility remained with the local field offices and their localized systems and mechanisms.

At various times between 1985 and 2006, the Naval Legal Service Command used the Judge Advocate General Management Information System (1985 – 1998), the Military Justice Management Information System (1999 – 2000), Time Matters (2000 – 2003), and the Homeport Electronic Legal Management System (2003 – 2006), principally at the field office level. The Naval Legal Service Command headquarters received reports, generally not directly from automated systems, which permitted tracking the numbers of cases and certain date parameters, but not individual cases, actions on cases, or case status.

Prior to 2005, there was no requirement for field offices to track a case after delivering the record of trial to the responsible convening authority for final action. Independent staff judge advocates and legal officers were principally responsible for post-trial processing, including staff judge advocate recommendations and convening authority actions (two key problem areas in post-trial processing). Their actions remained outside the purview of the Naval Legal Service Command, and were not in information systems available to the headquarters staff.

In 2003, the Naval Legal Service Command began using the Homeport Electronic Legal Management (HELM) system, which had a command-level case tracking function, but still did not allow headquarters-level monitoring. To compensate, from 1999 through 2005, local field offices were required to complete quarterly court-martial Situation Reports (SITREPS) using Microsoft Excel software.

Even using the Homeport Electronic Legal Management System and Situation Reports, however, only the number of cases was tracked and reported, not individual cases. In addition, independent staff judge advocates did not use these systems, or submit Situation Reports to the Naval Legal Service Command. At the headquarters level, the Naval Legal Service Command did not have visibility over the post-trial process.

Between 1980 and 2006, the Trial Judiciary (trial judges who preside over courts-martial) used the TRIJUDAC Management Information System, and both NAMARA and the Court could monitor cases in the system. However, the trial judge's jurisdiction over a case ended with authenticating the record of trial. The system did not capture or track post-trial processing beyond the trial judge's jurisdiction.

NAMARA and the Court used an Oracle-based information system, NAUTILUS (official name), which began tracking a case when the convening authority delivered the completed record of trial to NAMARA, usually by mail. NAUTILUS tracking continued through appellate court action(s) until the appellate process ended. These systems, however, did not enable either NAMARA or the Court to ensure they received a record of trial for every case in which appellate review was required. Like the Naval Legal Service Command headquarters, they did not have any visibility over courts-martial completed in the field, and did not know when to anticipate receiving records of trial.

On October 10, 2006, the Knowledge and Information Services Division (Code 65) fielded the CMTIS to allow the Naval Legal Service Command and NAMARA to track courts-martial from "... knowledge of the offense to the completion of appellate review ...". The CMTIS resulted from merging NAUTILUS (appellate case tracking system) and the TRIJUDAC Management Information System (Judiciary case management system). In connection with rolling out the new CMTIS, on October 3, 2006, the Navy JAG and Deputy Navy JAG sent a memorandum to JAG personnel worldwide, advising:

... Complete and accurate data collection is vital for achieving our JAG Corps 2020 Goals. Every member of the JAG Corps team must make CMTIS a part of his or her daily routine. ... CMTIS will permit all of us to track and manage cases and workloads across the enterprise, utilizing one simple application with specific modules pertaining to individual areas of practice. Developed with detailed input from users, CMTIS promises to be user-friendly and flexible. It will also help ensure the timely disposition of all military justice cases. ..."

The CMTIS represented a positive step, but did not give the Naval Legal Service Command, NAMARA, or the Court capability to monitor the post-trial process and prevent problems. The system was hampered with missing or inaccurate data, with cases recorded in the system where the underlying courts-martial could not be accounted for, and lost courts-martial cases that continued to surface without ever having been recorded in the data system.

One reason for the inadequate case visibility was overly restrictive limitations on system access and use. For example, even after receiving a record of trial possessing the overall data and information, NAMARA personnel were not allowed to complete missing data fields, or correct erroneous data. Only the responsible field unit could make such corrections. After we discussed our findings with the Navy JAG, the NAMARA was given more access and authority to enter data directly in the system.

#### **e. Marine Corps Case Tracking**

The Marine Corps introduced the CMS in 1996, and substantially upgraded it in 2009. The original CMS was available, but used only sporadically over the past decade. Most Marine legal offices used locally-created, ad-hoc systems/mechanisms to track and report on their cases. The CMS was not adequate for their needs.

In 2005, when the Navy began developing CMTIS, the Marine Corps elected not to participate. Although recognizing the value of having a single system, the Marine Corps was concerned about the Navy system's utility and effectiveness. The Marine Corps decided to await development of the Department of the Navy Criminal Justice Information System (DONCJIS), which was advertised as a cradle-to-grave system for the entire criminal justice community.

In late 2009, after problems in the DONCJIS development became known, the Marine Corps contracted with IBM to upgrade its CMS and achieve needed capability quickly. The upgrades were completed in the fall of 2009, and the new system was fielded in February 2010. The new CMS is a Lotus Notes-based, web-enabled database designed to track courts-martial from receipt of request for legal services through post-trial review.

Marine Corps field units have read-only access to the Navy's CMTIS, which they use to find out when records were received at NAMARA, or when a case was docketed at the Court. Periodically, they may also check the Navy system to ascertain a case's appellate progression. We were told the NAMARA Administrative Support Division was given "read" access and trained on using the Marine Corps CMS, so NAMARA could now have visibility over Marine Corps cases pending in the field.

#### **f. Assistant Judge Advocate General for Military Justice**

When the current Assistant Judge Advocate General for Military Justice (Code 02) arrived in August 2008, NAMARA did not have a case tracking mechanism to monitor cases an appellate court returned to the field for action (court mandates). At his direction, an in-house spreadsheet program was created to track court mandates.

Another significant tracking gap was NAMARA's lack of visibility over cases (Navy and Marine Corps) due at NAMARA, e.g., cases with adjudicated sentences requiring appellate review, but not yet received. Consequently, a second home-grown, spreadsheet-based tracking product

(Appellate Tracker) was developed to identify and monitor these cases, and follow them through the last Service action (DD 214 discharge certificate issuance).

This Appellate Tracker is hosted on the Marine Corps' SharePoint web site, and every legal office in the Marine Corps can review or update a record and post new information. To keep the field informed, NAMARA sends monthly trackers via e-mail to the Navy Region Legal Service Offices, and Marine Corps Legal Service Support Sections and Law Centers. The new procedures enable NAMARA to oversee case progress throughout the Navy and Marine Corps, and spot cases with unexplained or inappropriate delays.

The CMTIS stores data such as attorney time and workload, and was designed primarily to measure workload volumes (for manpower purposes), not case processing time and efficiency. According to one user, the system interface is "mediocre" at best and, overall, the system is not a useful tool for NAMARA. System users cannot generate ad hoc queries or reports directly. They must formally request a new or modified query or report and then wait for responses that may not come, or not meet the need even if developed.

Following system modifications in May 2010, NAMARA and other users can now import data from a new CMTIS "Post-Trial Tracker" report into Microsoft Access (database) or Microsoft Excel (spreadsheet) and use the data as they want. However, upon importing the data into a spreadsheet, we were unable to relate data in individual spreadsheet columns to data in the underlying CMTIS report columns. Multiple data fields are reported in single CMTIS report columns and much data imported into the spreadsheet arrived in columns without headings—date fields are generally indistinguishable without the column identifiers. In our meeting with the Navy JAG and senior staff on July 8, 2010, we were told the problems would be resolved in 2-3 months.

#### **g. Administrative Support Division, NAMARA**

A counsel from the Appellate Government Division (Code 46) recalled the 1989-1991 timeframe when the Administrative Support Division (Code 40) was awash in records, with cases stacked everywhere. About 1,200 cases were "lost" and a Marine Corps member from the Appellate Government Division was assigned to find them.

In 2002, a new military Director was sent in to fix the Division's many problems. When the new Director arrived, about 400 records of trial were backlogged on the shelves awaiting log in and docketing. His assessment was the section lacked a sense of urgency, had a generally passive, reactive approach to the duties, and a culture of inattention and indifference had taken hold.

According to this former Director, he developed and improved office processes, established production expectations, instituted an audit system (to identify pending cases and locate missing records of trial), drawing data from the NATUILUS and other systems available in 2002-2003. He recalled a judge advocate from the Appellate Government Division was tasked to find all records of trial that could not be accounted for, and the judge advocate spent 6-12 months tracking them down, although not all were found.

In 2003, the Administrative Support Division (Code 40) facility was flooded and sustained considerable damage. The staff was relocated for 6 months and, during that time, another case

backlog developed because so many personnel (mostly junior Marine enlisted members) were tasked to perform renovation duties and other labor tasks. The division adopted a Standard Operating Procedure (SOP) in that era to standardize processing and speed case in-processing, which eventually helped overcome the backlog.

This former Director believes the Navy started on the path to reforming its broken processes during the 2002-2005 timeframe. Prior to then, it was not unusual for cases several months to more than a year old to arrive from the field. They arrived in batches (8-10 in a box) because units would wait until they had a full box before mailing a record of trial to NAMARA.

Prior to 2003-2004, it was not uncommon for Trial Service Offices to send authenticated records of trial directly to the convening authorities (commanders) for post-trial processing and forwarding to NAMARA. Many special court-martial convening authorities were staffed with collateral-duty legal officers who may have lacked sufficient knowledge to handle the processes. After convening authority action, the records of trial were mailed directly to NAMARA without passing through the supporting Trial Service Office. Consequently, records of trial were often incomplete, improperly assembled, and had not been subjected to quality review.

Court mandates were also a significant problem, as they were mailed directly to the convening authorities who often had no idea what to do with them. Cases often languished because collateral duty officers also did not know what to do with them. In approximately 2005, the previous Navy JAG, Vice Admiral Bruce MacDonald, changed the procedure, requiring all records of trial and court mandates to pass through the supporting Trial Service Office/Region Legal Service Office.

After the *Moreno* case in 2006, a Naval Reserve judge advocate was activated specifically to track down Navy and Marine Corps cases requiring appellate review and not received at NAMARA. To identify the missing cases, the Reserve judge advocate searched the Navy and Marine Corps Appellate Leave Activity database to identify individuals on appellate leave who had received sentences requiring Article 66 reviews. He then compared the names in NAUTILUS database records with names in records of trial received at NAMARA to identify missing records of trial, and then contacted field units to locate missing records. He identified about 400 missing records of trial and ultimately found “nearly 95 percent” of the missing records. (**Note:** even at a 95 percent find rate, about 20 records of trial were still missing, indicating individuals were placed on appellate leave, but their appeals were not initiated.)

Subsequently, NAMARA conducted this type “audit” approximately quarterly and continued to resolve actual or potential lost case issues. As of July 8, 2010, the Navy JAG had identified every sailor or marine currently in confinement and completed physical file reviews on their appellate cases. Although the Navy JAG assured us there will not be another *Foster* case, he could not give us a similar assurance regarding appellate cases for convicted sailors and marines no longer in confinement. He did assure us the 1,096 cases entered in CMTIS since October 1, 2006 were all accounted for, and every one of the 35,218 cases in CMTIS predating October 1, 2006 (partial records rolled-up into CMTIS from prior systems when CMTIS was activated) are either closed cases, or NAMARA received the records of trial. Again, he could not assure us that every historic case subject to appellate review was entered into CMTIS.

Another problem impacting the Administrative Support Division was “trouble cases,” e.g., they were missing documents, improperly assembled, or had other problems when received at NAMARA. About 4-5 years ago, 15-20 percent of the records of trial received at NAMARA were trouble cases.



Further, after the problems were brought to the responsible field unit's attention, it was not uncommon for individual records of trial to "sit" 8-9 months before field units completed corrections so the appeals could go forward.

#### **h. Appellate Defense Division**

**Caseload:** The number of general and special courts-martial in DON generally declined relatively steadily between FY 1990 and FY 2009, but there were increases in FYs 1996-1997, FYs 2000-2002, and FY 2004. On a year-to-year basis, the number of courts-martial increased 312 in FY 1996, increased 358 in FY 2000, and increased 16 in FY 2004.<sup>24</sup> The increases had a significant impact on case processing at the appellate level, especially when considered in conjunction with the personnel reductions occurring in the decade following the first Gulf War.

The Navy Judge Advocate General's Annual Report (1997-1998) to the U.S. Court of Appeals for the Armed Forces confirmed problems in the Appellate Defense Division (Code 45). The report noted, by the end of FY1998, the Appellate Defense Division had been able to resolve a case backlog generated over previous years. The Division accomplished the reduction with 17 active duty and 25 Reserve judge advocates. A 75 percent personnel turnover occurred the previous summer, and the Reserves were credited with keeping the Division afloat.

A 2003 U.S. Court of Appeals for the Armed Forces' case, *United States v. Brunson*, 59 M.J. 41 (C.A.A.F. 2003), specifically commented on the "serious pattern of delay" in cases from the Appellate Defense Division. In reviewing the U.S. Court of Appeals for the Armed Forces' petition docket, the Clerk of Court's office discovered 26 cases in which timely petitions had been filed, but supplements to the petitions had not been filed within specified timelines.<sup>25</sup> Following an inquiry from the Clerk of Court's office, the Appellate Defense Division filed motions to file supplements "out of time" in all 26 cases. As of August 1, 2003, the U.S. Court of Appeals for the Armed Forces' petition docket included 43 cases in which petitions were filed without any timely supplement filings. Counsel filed motions to file supplements "out of time" in 35 of these cases, "out of time" requests for time extension in 3 cases, and did not file a motion or request in the remaining 5 cases. In the 38 cases in which a motion or request was filed, the motion or request was filed 6 to 26 days after the due date.

Another 2003 U.S. Court of Appeals for the Armed Forces case, *Diaz v. JAG of the Navy*, 59 M.J. 34 (C.A.A.F. 2003), addressed lengthy delays in processing the case, which was on its 11<sup>th</sup> time extension from the Court. Diaz had been confined 2 1/2 years and had his second appellate defense counsel. The first counsel cited caseload commitments as the reason for needing the 10<sup>th</sup> time extension. The U.S. Court of Appeals for the Armed Forces directed the Court to expedite the review and, more extraordinarily, to submit a report within 60 days detailing the steps being taken to assure appellants their rights to timely review under Article 66, Uniform Code of Military Justice.

**Staffing:** We first noted the mention of an Appellate Defense Division staffing issue in an appendix to the *Foster* inquiry. In the appendix, Captain Charles Dorman (then Director, Appellate Defense Division and later Chief Judge, Navy-Marine Corps Court of Criminal Appeals) commented that in

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<sup>24</sup> Records are inadequate for us to determine the cases requiring appellate review included in the overall courts-martial increases.

<sup>25</sup> A petition asks a court to take a specified action. A supplement adds to an original petition.

about 1996, he began to advocate hiring additional staff, including two civilian attorneys to provide continuity and assist the Division with more complex cases. He had observed that longer, more-complex cases were being passed from one counsel to the next, and multiple time extensions were being requested. He also had noticed how long it was taking for the Court to receive records from the field.

In 2001, according to one source, 17 defense counsel handled an average 50 cases each at any particular time. Another source recalled only 12-13 counsel during the September 2001 to May 2002 timeframe, with 2 Reservists mobilized in February 2002. These counsel included an experienced Navy Captain as the division director, an O-5 (commander) deputy director, and four O-4 (lieutenant commander) branch heads. With the increase in courts-martial beginning in 2000, the number of cases in the Appellate Defense Division pending briefings to the Court rose from 603 in 1999 to 1,233 in 2001, a 105 percent increase.

Staffing reviews in 2001 and 2002 both concluded the Appellate Defense Division did not need additional staffing. However, in 2001, the then Assistant Judge Advocate General for Military Justice, Captain Dorman, learned about staffing issues in the Appellate Defense Division. He frequently reassigned counsel inbound for the Appellate Government Division to the Appellate Defense Division to alleviate the staffing problem. Between June 2002 and October 2003, the O-5 (commander) Director requested additional assistance numerous times, but to no avail.

A former appellate judge confirmed that proper staffing was an issue when he served in the late 1990s. The Appellate Defense Division always seemed to be understaffed, and the Appellate Government Division always seemed to be overstaffed. The Appellate Government Division always had an O-6 (Navy captain/Marine Corps colonel) director, and the Appellate Defense Division sometimes had only an O-5 (Navy commander/Marine Corps lieutenant colonel) director. He commented that Appellate Defense generally needs more people than Appellate Government because they have more work to do and bear the burden of identifying issues and preparing initial briefs. Appellate Government has only a reply obligation. Even in merits submissions,<sup>26</sup> defense counsel has to read the entire record and determine whether issues need to be raised. Merits submissions create virtually no work for the Appellate Government Division.

In 2003, a court-directed report in the Diaz case prompted a third staffing review. This review resulted in a May 2003 decision to (1) increase the Appellate Defense Division staffing from 14 to 20 appellate defense counsel, (2) activate three Reserve counsel, (3) require at least second-tour judge advocates with field experience, additional training, and better case prioritization, and (4) restore the Director position as an O-6 (Navy captain/Marine Corps colonel) with strong military justice background.

The staffing increase ultimately put the Appellate Defense Division on the path to recovery, but the curative measures had not been anticipated soon enough to prevent a growing backlog. By September 2003, the backlog was 1,099 cases and moving from the Appellate Defense Division into the Court.

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<sup>26</sup> The term “merits submissions” refers to cases presented to the Court on the merits, without defense counsel asserting any specific error, or submitting any supplemental pleading or legal brief.

By 2003, the number of counsel in the Appellate Defense Division had declined from 17 to 13. Additionally, the Director was no longer an O-6 (captain), but an O-5 commander (the Director, Appellate Government Division remained an O-6). The Deputy Director was also an O-5. The average workload per counsel had increased to 70 cases, including three capital cases. During tenure in the Appellate Defense Division from May 2001 to June 2004, one counsel recalled her caseload generally varied from 40-60 cases, but peaked to over 90 cases at one point, reflecting a substantial backlog.

During the peak, cases were literally stacked everywhere in the counsels' offices--on shelves, in file cabinets, and on the floor. To assist with complex capital cases, two senior Reserve counsel were recalled to active duty. Despite their assistance, the need for time extensions to file defense briefs culminated in the Appellate Government Division agreeing:

- not to oppose the first 8 defense requests for time extension;
- to determine, on a case basis, whether to oppose time extension requests between 8 and 14; and
- beginning with the 15<sup>th</sup> request for time extension, to impose a standing objection.

In an August 31, 2004, memorandum to the Assistant Judge Advocate General for Military Justice, Subject ". . . [Time Extension] Polices," the Director, Appellate Government Division, stated concerns about the aforementioned "agreement" between the two Divisions. He commented that his Deputy had opposed 46 Defense requests for time extension in the prior 3 months, all in cases with more than 13 time extensions, meaning at least 18 months had elapsed since the cases were docketed with the Court. All the time extension requests were granted over his objections.

**Director position:** The Director, Appellate Defense Division (an O-6 authorization), suffered from considerable turmoil and under-grading from about 2000 through 2003, and was experiencing similar problems again at the time of our interviews. In 2001, the O-5 Director was in the office only 2-3 days a week because he was commuting from Rhode Island. The next director, an O-6, was in the office only 9 months. The O-5 Deputy succeeded that Director. In October 2003, following the Diaz case, an O-6 was again assigned. There were four different Directors in the 2001-2004 timeframe.

At the time of our interviews, the current Director (assigned in December 2009) was detailed full-time to assist with the Section 506 panel review. This Director was supposed to have left the Appellate Defense Division in April 2010, for duty on the Court. The replacement was to arrive in summer 2010, but was also diverted to other duties (as of the date on which this report was drafted). The Director, Appellate Government Division, an O-6 (Navy captain/Marine Corps colonel) position, appears to have been consistently filled at that level.

A former appellate judge noted the turbulence and occasional Director under-grading in approximately 2000 through 2003. This individual opined that the defense backlog at the time had several causes, among them inadequate supervision and oversight in the Appellate Defense Division. The Director and Deputy Director at the time were "hands off" and did nothing about inadequate productivity. During this time, there was generally no good cause for delays;

leadership simply was not addressing the problems and judges generally obliged defense requests for more time.

**Performance problems:** A former appellate judge noted competence problems in the Appellate Defense Division as well. Historically, the common practice was to assign first-tour judge advocates to the Appellate Defense Division. This practice was terminated in about 2003.

A November 2005, briefing slide depicted significant progress in reducing the backlog after the May 2003 decision to increase staffing in the Appellate Defense Division. The following table is derived from this briefing slide.

**Appellate Defense Division  
Case Age (in Months) at Various Dates**

Date	7-12 Months		13-18 Months		Over 18 Months		Total	
	No.	%	No.	%	No.	%	No.	%
8/1/2003	141	56.9%	69	27.8%	38	15.3%	248	100.0%
10/1/2003	131	56.0%	61	26.1%	42	17.9%	234	100.0%
10/1/2004	52	63.4%	16	19.5%	14	17.1%	82	100.0%
10/1/2005	11	68.8%	2	12.5%	3	18.8%	16	100.0%

As can be seen in the table, between August 1, 2003, and October 1, 2005, the proportion of total cases 7-12 months old (most current cases) increased from 56.9 percent to 68.8 percent, demonstrating the process had become more timely. Conversely, the number of cases in the 13-18 months and over 18 months categories (oldest cases) declined significantly, further demonstrating the improvement in timeliness.<sup>27</sup> The total cases involved also declined dramatically, from 248 on August 1, 2003, to 16 on October 1, 2005, demonstrating the previous backlogs had been resolved.

We attempted to update this information, but it was no longer tracked in this format. We note, however, statistics in the O'Toole Report indicate the improvements generally continued through October 1, 2006--only two cases pending for more than a year and only six cases pending longer than 6 months on that date. The number of requests for time extension (shown and discussed later in this report) also indicate continuing improvement in this area.

The backlogged cases were moving, and many were appealed to the U.S. Court of Appeals for the Armed Forces, resulting in two landmark decisions addressing continuing, unreasonably-long- post-trial delay: *United States v. Moreno*, 63, M.J. 129 (C.A.A.F. 2006), and *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006) (*Toohey II*), both involving Marine Corps cases. *Moreno* imposed post-trial processing standards that, if violated, would trigger an unreasonable delay presumption and analysis for prejudice. These standards are applicable to all the Services.

<sup>27</sup> The proportion of cases in the over 18 month old category increased from 15.3 percent to 18.8 percent, but this factor is not important in view of the significant declines in both total cases and in cases in each individual category.

In response to the court denouncements, both the Navy and Marine Corps used Reserve judge advocates to surge support and clear the remaining backlog in the Appellate Defense Division.

**Reserve Assignments:** Due to a recent change in Reserve judge advocate assignment policy, the experience level for Reserve judge advocates assigned to the Appellate Defense Division is declining. This policy requires new Reserve members to serve their initial tours in traditional drill units (generally, a Region Legal Service Office, or Naval Legal Service Office) where they can receive mentoring and administrative support to prepare them for careers in the Navy Reserve. Previously, new Reserve members with appellate experience could be assigned to “flex” drill units supporting the appellate divisions. Consequently, the Appellate Defense Division is now assigned a more senior pool of Reservists (often O-6s), but without appellate experience.

**Chief Defense Counsel:** There has never been a Chief Defense Counsel position in the Navy, and no single entity serves as the advocate, sponsor, or office of primary responsibility for defense services. The Appellate Defense Division offers limited support and advice to field calls for assistance, refraining from more active involvement due to ethical considerations. One current official told us that, based on the limited objections raised and how quickly counsel backs down when objections are raised (based on reading the record of trial), it appears field defense counsel could benefit from having more experienced supervisors and more advanced training.

**Tracking:** CMTIS generally has been ineffective for the Appellate Defense Division, and the Knowledge and Information Services Division (Code 65) has not been fully responsive to change requests. Some past problems included:

- Reserve judge advocates show up in reports requested for active duty personnel – the Appellate Defense Division has been trying to have this problem corrected since November 2009;
- the Appellate Defense Division cannot run needed reports, such as a “pending cases” list for a departing counsel, or a list showing all cases ever assigned to a particular counsel (both reports were available in the previous NAUTILUS);
- CMTIS does not have categories to identify filings with higher courts – U.S. Court of Appeals for the Armed Forces or the Supreme Court;
- CMTIS does not have separate data fields to track time extensions for the different courts – once a case goes to a higher court, any time extension the lower court granted in the case appears in CMTIS as if the higher court granted the time extension—if the lower court and higher court both grant time extensions in the case, the lower court record is lost in CMTIS; and
- the CMTIS cannot manage/track cases assigned to Reservists (27 Reservists who prepare briefs are in the Appellate Defense Division)--the office manager developed an ad-hoc database to manage these cases.

#### **i. Appellate Government Division**

In the 2001-2003 timeframe, the then Director, Appellate Government Division (Code 46), arrived for duty to find a “stunning” case backlog in NAMARA, a situation relatively unchanged from a previous tour in the division a decade earlier. An anthrax incident exacerbated the backlog, significantly slowing record of trial deliveries to the Navy Yard.

Time extensions were a "runaway" problem. The Director required counsel to challenge requests, asking that Appellate Defense Division counsel justify requests for time extension, but the Court declined to do so. According to this former Director, the *Foster* case was inevitable; military justice lacked effective processes and standardization.

According to the current Director, the Appellate Government Division has not used CMTIS in day-to-day operations, e.g., to track cases, generate pleadings, or track filing deadlines. Rather, the Division uses the Marine Corps' Microsoft "Share Point" application as a collaborative way to draft, review and finalize pleadings, as well as track cases and filing deadlines.

The CMTIS was too cumbersome, did not have a collaborative function, and could not be relied upon, as it often contained erroneous or incomplete information. Several people, usually legal clerks and support staff, enter data in CMTIS during the post-trial process. The inaccuracies result from events the support staff does not know about, or transcription mistakes in data entry.

For the Appellate Government Division, CMTIS is used strictly as a backup to check for filing date discrepancies. Because the responsible counsel enter and use SharePoint data directly, they have a vested interest in ensuring completeness and accuracy, including accurate filing dates. Thus, for any discrepancy between CMTIS and SharePoint, SharePoint is almost always relied on as the accurate data.

To amplify CMTIS shortcomings, the Director provided a March 4, 2010, system-generated report entitled "Cases with a Trial Date but Not Received at Namara with Forum of GCM [General Court- Martial] or SPCM [Special Court-Martial] with Confinement > 1 Year and/or Discharge." The report purported to show cases not received at NAMARA, although subject to appellate review under Article 66(b), Uniform Code of Military Justice. The report contained 27 pages of cases dating to 1999, and raised questions about CMTIS interoperability, usefulness, and accuracy as a case-management tool.<sup>28</sup>

Much data in this March 4 report preceded CMTIS, and may have resulted from the system's inability to incorporate and integrate case information from previous systems. However, about 3½ years after the CMTIS fielding, this system report had several pages of cases for which up-to-date information was missing, again calling into question the system's ability to track cases accurately. Furthermore, the inaccurate and/or incomplete information existed despite the numerous reviews/audits conducted over the last 3½ years to locate and deal with lost cases. As far as we could tell, not one prior review/audit included updating or correcting the official Navy case record. We tallied the following statistics from this CMTIS report:

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<sup>28</sup> We previously discussed in detail the March 4 report, as well as several lost cases (e.g., *U.S. v. Bartolo*) subsequently discovered. The March 4 report did not include appellant names, so we could not determine if the report included these lost cases.

**March 4, 2010, Appellate Government Division  
Report From CMTIS Purporting to Show Cases  
Subject to Review, but not Received at NAMARA**

Year *	No. Cases		Percent	
	In Year	Cumulative	In Year	Cumulative
1999	10	10	0.80%	0.80%
2000	81	91	6.80%	7.70%
2001	154	245	13.00%	20.60%
2002	177	422	14.90%	35.60%
2003	125	547	10.50%	46.10%
2004	124	671	10.40%	56.50%
2005	82	753	6.90%	63.40%
2006	76	829	6.40%	69.80%
2007	70	899	5.90%	75.70%
2008	61	960	5.10%	80.90%
2009	166	1,126	14.00%	94.90%
2010	61	1,187	5.10%	100.00%
	1,187		100.00%	

\* Based on CMTIS number.

As can be seen above, 829 cases (69.8 percent of the total) predated 2007, more than 39 months old at the report date.

The Appellate Government Division was unable to identify and locate cases in the “Cases not received” reports. As an example, we were shown a random report that included a case tried in July 2007. The CMTIS showed a convening authority action in October 2007, but no further information. No one was able to ascertain the current case status.

The Director previously provided this report to several others in the Navy JAG organization for follow-up. The distribution included those individuals responsible for CMTIS. At the time, he was told the apparent problem was merely a system failure to transfer old data into CMTIS, and the inability to transfer new data to the specific report. Although this case may represent an extreme example, it is not uncommon for the system to have incorrect or missing data.

The Director told us the Knowledge and Information Services Division (Code 65), the organization responsible for CMTIS, is working hard to correct deficiencies and inaccuracies, but the data depend on those inputting the information and the system’s flaws are systemic. The CMTIS is fundamentally separate and distinct from the actual work products of those responsible for information accuracy. We are not convinced the system modifications in May 2010 resolved the CMTIS problems.

Another longstanding problem involves court mandates. The CMTIS inability to track court mandates efficiently and effectively makes it impossible for the Appellate Government Division to monitor status. This remained an issue until recently when the Assistant Judge Advocate General for Military Justice (Code 02) directed NAMARA to go through the system item-by-item and record, on a spreadsheet, all outstanding mandates. He also directed a new procedure to



track the cases and ensure timely compliance with whatever action a court had ordered in the mandate.

The NAMARA recently asked the Knowledge and Information Services Division (Code 65) to create a mandate tracker report in CMTIS, which they did; however, the report was not “user-friendly.” As a result, NAMARA began manually entering the CMTIS report information in another ad-hoc spreadsheet to capture needed data in a usable form.

The Appellate Government Division tracks and oversees case production using the Marine Corps SharePoint website. The Assistant Judge Advocate General for Military Justice introduced this resource to resolve the many problems and frustrations permeating NAMARA, which resulted from inadequate information available from existing automated tools. Anyone with access and permission to the SharePoint site can see and monitor all cases currently at the Appellate Government Division. The visibility allows anyone to track a case’s status, including time extension requests and approvals. From this site, one can access all relevant pleadings associated with an appellant. The intent, when high-speed scanners become available, is to have the entire record of trial also available on SharePoint.

#### **j. Navy-Marine Corps Court of Criminal Appeals**

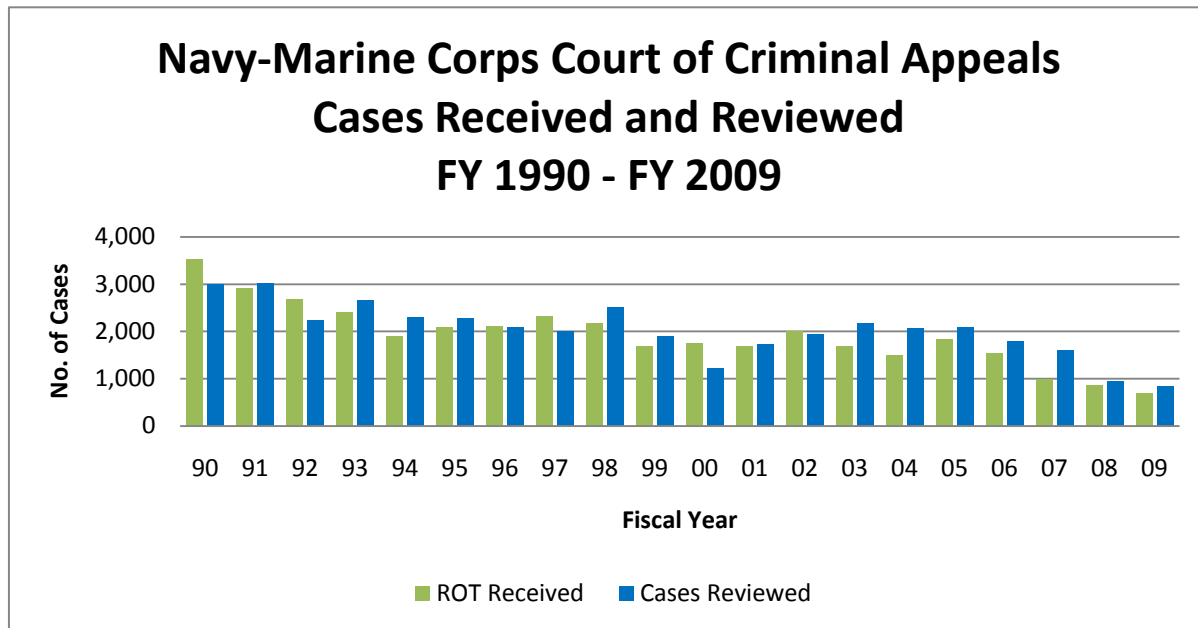
Historically, the Court has been troubled with difficulties in administration, staffing, and case tracking and management. In this regard, the Court handles a larger caseload each year than any other Service court of criminal appeals, and prior to 2006, resolved more cases than all the others Service appellate courts combined. And, the Court did so with fewer judges, fewer appellate counsel, and smaller support staffs than the Army and Air Force appellate courts. Navy and Marine Corps judges generated more case decisions per judge than judges in the other Service appellant courts.

**Caseload:** The most recent case backlog in the Court began in 2000, when the Court decided 1,219 of the total 1,738 cases received that year. The shortfall was due, in large part, to lower staffing, but other problems contributed to the backlog. A primary cause was inadequate case management and prioritization. Aware that a high number of cases were coming to the Court, the judges focused on numbers, trying to resolve an equally high number of cases and not fall farther behind. Some concentrated on resolving “easy” cases quickly, foregoing work on the more complex, or longer cases requiring substantial review time. Nonetheless, in 2001 - 2002, the Court decided several hundred fewer cases than were docketed, and the backlog increasingly became larger, more-complex felony cases.

Available statistics on general courts-martial support this information. According to Navy documents we reviewed and the O’Toole report, general court-martial reviews in 2000 - 2002 were substantially fewer (by half or more) than in all other years from 1999 through 2008. As an apparent result, between 2001 and 2002, cases over 6 months in panel increased to nearly 100 (none over 6 months in FY 2000). By 2004, nearly 50 cases had been in panel for more than 12 months.

On September 30, 2004, there were 104,529 pages of records on the shelf and the number increased to 112,726 pages on March 31, 2005. The appellate divisions and Court did not eliminate this backlog until 2008-2009.

The graph below compares the total general and special courts-martial received and reviewed in fiscal years 1990 through 2009.



As can be seen above, in 15 of the past 20 fiscal years, the Court reviewed more cases than it received in the year. This has been true in every fiscal year after 2002, indicating the Court has continued working to resolve a case backlog.

A July 7, 2005, memorandum from the Court’s Chief Judge to the Senior Executive Board announced a series of initiatives to address the backlog, including:

- automate brief sheets for merits submissions (about 60 percent of caseload);
- standards for when and how to write opinions, focusing on using succinct language and creating an electronic bank of common language/clauses;
- using contract paralegals;
- assigning a Reserve judge to each active duty judge for training, mentoring and productivity;
- improving new judge training;
- monitoring productivity, including record of trial page tracking; and
- recruiting more Reserve personnel for commissioner duty preparing briefs.

He recommended: maintain at least 9, optimally 10 judges on the Court (at one point in FY 2002, the Court had only 5 sitting judges and was scheduled to have 7 or fewer judges by summer 2006); add 3 civilian judges for continuity and experience; eliminate “gapped billets” on the Court; fund contractor support to develop a new training manual; create a cradle-to-grave

tracking database; and require staff judge advocates to explain delays. Generally, these recommendations were offered as helpful options.

During FY 2005, the following actions were taken to address the backlog:

- increased from 2 to 5 commissioners;
- contracted for 2 civilian paralegals and 2 civilian attorneys;
- increased from 9 to 12 judges (in 2006, increased to 17 judges -- 13 active and 4 Reserve);
- increased the number of Reserve judges;
- streamlined the Court's processes;
- focused efforts on longer, older cases; and
- improved case prioritization—the first-in-first-out standard was modified based on case type, age, and confinement status.

In June 2006, an appellate Judge wrote a paper outlining more initiatives and recommendations, including:

- create new Rules of Practice for the Court (in June 2006), to reduce submission times for legal briefs, limit brief pages, prohibit automatic time extensions, and require a second time extension request to trigger a chambers conference and a third request to trigger a report to the Assistant Judge Advocate General for Military Justice and the Navy JAG;
- improve case tracking from docketing through opinion;
- require judicial status reports for all cases older than 6 months with internal reviews every 3 months until completion;
- adopt internal Court processing goals to facilitate compliance with the 18 month standard in *Moreno*;
- improve Reserve utilization;
- create a three-experienced-judge "cold case" squad to work the oldest, most difficult cases (33 in panel more than 6 months at the time);
- maintain a 12 judge panel until all backlogs are eliminated;
- maintain a full cadre of commissioners;
- detail senior enlisted personnel to handle administration;
- revisit the civilian judge proposal;
- establish a rigorous judicial screening board;
- establish a clerk program--one year at Court and then into the Appellate Defense Division, or Appellate Government Division;
- begin using electronic records of trial;
- eliminate judge authentication--enable court reporter or trial counsel to authenticate records of trial;
- permit an accused to waive appellate review as part of pretrial agreement (equates to civilian practice);
- reduce number of Navy and Marine Corps convening authorities; and
- staff NAMARA with more judge advocates.

By March 31, 2006, the page count in judicial panel had declined to 77,620 pages and the number of cases in panel over 6 months had declined to 39. Total cases in judicial panel was down to 253, the lowest since FY 2002.

The table below shows the number of cases docketed with the Court and pending in judicial panels on various dates between December 31, 2000, and December 31, 2009. The table also shows the numbers of cases pending in panel longer than 6 months and 12 months on the dates specified.

**Navy and Marine Corps Appellate Cases  
Docketed with Appellate Court, and  
Pending Decision in Judicial Panels**

Date	Cases Docketed	Cases Pending In Panel		Cases In Panel > 6 Mos		Cases In Panel > 12 Mos	
	No.	No.	% *	No.	% **	No.	% **
12/31/00	1,319	87	6.6%	7	8.0%	0	0.0%
04/30/06	794	325	40.9%	24	7.4%	14	4.3%
07/01/09	320	173	54.1%	7	4.0%	0	0.0%
12/31/09	189	75	39.7%	4	5.3%	0	0.0%

\* Percentage of total cases docketed

\*\* Percentage of total cases in panel

As can be seen above, at December 31, 2009, the numbers were at their lowest levels since April 30, 2006, indicating substantial improvements in this area.

In a September 2007 update, the Court's Senior Judge urged a minimum cadre of 9 appellate judges for the foreseeable future, and more former trial judge assignments to the Court, to increase experience levels and reduce the learning curve. Low experience levels impacted productivity, despite an improved caliber of judges overall, and the lack of career milestones impacted the Navy's ability to develop a future cadre of qualified judicial candidates. Additionally, four experienced judges were serving additional duty tours on the Court of Military Commission Review, which was their primary duty under DoD regulation.

**Tracking:** Although NAMARA initiated the NAUTILUS tracking system in 1996, it could not automatically flag cases in which the accused remained confined. The Court could "sort" cases by trial date, docket date, or date assigned to panel, but the system could not identify cases involving a confined appellant. Given the very substantial number of cases and those pending in panel for long time periods, over the next 10 years, management emphasis appears to have focused primarily on a "macro-level" approach to tracking cases based on the date assigned to a panel. The apparent intent was to reduce the number of older cases and eliminate the backlog, but the emphasis did not include any prioritization for factors such as an accused's confinement status.

**Staffing:** Insufficient staffing made it difficult to reduce the backlog. The Court was assigned 6 judges in 1999, 7 judges in 2000 through 2002 (but was down to 5 judges at one point during these years), 8 judges in 2003, 9 judges in 2004, 10 judges in 2005, and then surged to 16 judges in 2006. When Captain Dorman became the Chief Judge in 2003, the Court was at seven active duty judges, and three recently-departed judges had "dumped" many cases on the remaining judges. Judge Dorman lobbied continually for more judges.<sup>29</sup>

In 2004, Navy JAG leadership changed. The new Navy JAG had considerable military justice experience. In 2005, Chief Judge Dorman authored memoranda to the Navy JAG and Senior Executive Board appealing for a staffing increase, asserting the Court was inadequately staffed, describing the backlog, and highlighting the backlog's development due to an insufficient appellate defense staff in prior years. Shortly thereafter, in reaction to this advocacy and the *Diaz* decision ordering the Court to prepare a report explaining how it was going to address the backlog, the situation began improving. New judges began arriving in December 2005.

The Navy JAG activated three Reserve judges, increasing total judges from 9 to 12, increased the number of clerks from 2 to 5, and added 2 civilian staff attorneys. Additional Reserve judges were also added to the Reserve unit supporting the Court. A pilot law clerk program was initiated in 2006. Nine judge advocates (four active duty and five active-duty Reservists) came to the Court as law clerks. Two former clerks are now assigned as appellate government and appellate defense counsel, and a third was selected for the Judge Advocate General Corps' new litigation career track as a "Specialist."

By 2008, the Court and appellate divisions had generally resolved the case backlog. From a high of 18 appellate judges, the Court declined to 12 judges through the summer 2008 (10 active-duty and 2 Active Duty for Special Work Reservists). By fall 2008, the number had declined further to 10 judges, including one remaining Reservist. This Reservist was demobilized in September 2009, and replaced with an active duty judge, which kept the court at 10 judges. The number of clerks declined more rapidly, reaching a low of four, but in early 2009, the Navy JAG authorized an increase to two per panel. The Court now has 10 judges (3 each for 3 panels, plus the chief judge) and 7 law clerks (2 per panel, plus the senior clerk).

***U.S. v. Foster* /Judicial conduct and supervision:** *U.S. v. Foster* revealed a serious problem with post-trial processing delays-- the initial appellate review took almost 10 years to complete (sentenced December 1999, convening authority action February 2001, court docketing November 2001, and decision February 2009). Delays included 5 years to brief the case (26 time extensions) and order a *DuBay* hearing, and another year to complete the *DuBay* hearing.<sup>30</sup> In a concurring opinion in *Foster*, Chief Judge O'Toole commented that, although there was fault for delayed justice at every point in the post-trial process, "the principal responsibility for delay rests with this court."

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<sup>29</sup> In 2004, he was permitted to contract for some paralegals to support existing judges.

<sup>30</sup> A 1967 case (*United States v. DuBay*, 17 U.S.C.M.A. 147, 37 CMR 411) established procedures for holding hearings to determine issues raised collaterally that required findings of fact and conclusions of law. The hearings are commonly referred to as *DuBay* hearings.

A Navy JAG-directed inquiry following *Foster* revealed other problems with the Court. The Army appellate judge appointed to conduct the *Foster* inquiry addressed both management practices and judicial conduct, including the Court's multiple time extension approvals with virtually no justification required. Ultimately, 26 time extensions were granted, with no indication the Court ever conducted a rigorous inquiry into any basis for the requests.

The first judge assigned had the case for 18 months before retiring, with no evidence he worked on the case. He also left several other cases untouched, without formal case transfers or reassignments before his departure. The cases were simply "found" in his office.

The case was assigned to six different appellate judges during its pendency at the Court, with only two giving it immediate attention and review. The final reviewing judge noted the legal issues were readily identifiable with cursory review. According to the O'Toole report, the judges involved in the *Foster* case were:

the product of an environment in which military justice was not viewed as a career enhancing experience. Accordingly, military justice litigation experience and judicial expertise were not primary factors in the selection of judges to the court. Indeed few had sufficient judicial experience to recognize that 25 delays by counsel in a single case should be a matter for concern . . . the lead appellate judge originally entrusted with the *Foster* case . . . did not have an adequate military justice litigation background, he never attended the Military Judges Course [not mandatory until recently], [and] he was not well-suited to the appellate bench . . .

Another issue highlighted in the *Foster* inquiry was the apparent lack of judicial supervision. At least one judge spent relatively little time working in the office, further aggravating caseload issues. This lack of diligence was known to the then Chief Judge, but nothing was done. Another judge frequently commuted from long distances, or tele-worked, due to personal family problems.

Among other difficulties a former chief judge asserted as reasons for not supervising a judge's performance was the proscription in Article 66 (g), Uniform Code of Military Justice, which provides ". . . no member of a Court of Criminal Appeals shall be required . . . or permitted, to prepare, approve, disapprove, review or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member . . . is qualified to be advanced in grade, or in determining the assignment or transfer of a member. . . ." This prohibition was offered as the reason for the Chief Judge not dealing more forcefully with performance issues. In addition, there were inadequate performance standards or objectives to measure and assess a judge's performance.

The inquiry officer's conclusions noted a "cavalier attitude to timely military justice at virtually every stage," and no sense of urgency in the post-trial or appellate process. Cases at the Court were handled on a first-in-first-out basis without consideration to prioritizing cases requiring expedited attention.

The O'Toole report notes the *Foster* case appeared to have been "largely ignored by the lead judge and unnoticed by the supervisory judges," despite the claimed capability to track individual cases in panel, both in NAUTILUS and in CMTIS. There were inadequate inquiries into case status and a general failure to use available tools and metrics to monitor case progression and caseload generally.

Our interviews disclosed that, in the past, judge selections were often based on the individual officer's geographical and retirement assignment preferences. Most appellate judges were in their final active-duty assignment. Compounding the experience and competence issues, officers selected for duty as appellate judges were not always required to attend and pass the Military Judge's Course at the Army Judge Advocate General School before being permitted to serve as a judge.

#### **k. Other Appellate Processes**

Including docketing time at the Court, in 2007, receiving, processing, delivering, and docketing records of trial at NAMARA required as much as a month. To streamline and standardize this intake process, both NAMARA and the Court conducted Lean Six Sigma evaluations, which a "Black Belt" Lean Six Sigma facilitator coordinated. As a result, case processing time in NAMARA was reduced from an average 17 days to 1 day. The docketing process, which formerly averaged 8 days, was reduced to 1 day. Other positive results included a pilot program for uploading appellate briefs into CMTIS; electronic filings with the Court; scanning smaller records of trial for electronic transmission to reserve counsel, which saves 4 days on average mailing time and approximately \$56.00 per record; and establishing a working group to explore implementing electronic records of trial.

#### **l. Inspections**

##### **(1) Navy**

The Navy JAG has had an Inspector General (JAG IG) position for at least 25 years. The position was converted to a civilian position in 2001. The current JAG IG has been in the position as a civilian since January 1, 2002. The same individual was the JAG IG for a year previously while in the Navy as a captain and judge advocate. The JAG IG conducts inspections under authority from the Commander, Naval Legal Service Command. The Deputy Judge Advocate General is the Commander, Naval Legal Service Command. The JAG IG reports to the Deputy Judge Advocate General, who is responsible for rating the JAG IG's performance. The JAG IG's charter is, among other things, to inspect all Naval Legal Service Command organizations and staff judge advocate offices, as the Navy JAG selects, partially fulfilling the Navy JAG's Article 6 inspection mandate. The JAG IG does not inspect Marine Corps units.

In 2006, the then Commander, Naval Legal Service Command, (now the Navy JAG) restructured the JAG IG inspection program. In the previous 10 or more years, an inspection team (6 to 8 subject matter experts under JAG IG direction) would go to a field unit and complete an inspection using, in large part, the requirements in Commander Naval Legal Service Command Instruction (COMNAVLEGSVCCOMINST) 5040.1C, "Command Inspections," January 30, 2001, including Enclosure (3), "Command Inspection Checklist." Each subject matter expert



reviewed records and files using the checklists to gather information about case processing and tracking.

The restructured inspection program eliminated the “on-site, in-the-field” examination of such information and the six-to-eight-member inspection teams. Now, the JAG IG conducts the inspections alone.

The present on-site inspection involves 18 topic areas, but is limited to matters that cannot be assessed from other sources, reports, and information provided to the Naval Legal Service Command headquarters and Navy JAG. And, for the most part, information from field units to Navy headquarters is not shared with the JAG IG either before or during the inspections.

An on-site inspection is now designed to be supplementary, not comprehensive -- just one part in an overall field command evaluation. The Management and Plans Division (Code 63) and the Assistant Judge Advocate General, Director of Operations (Code 06), are responsible for case metrics and tracking *Moreno* statistics, and the information is not shared with the JAG IG.

According to the JAG IG:

- JAGINST 5810.1, “Management Goals for Processing Navy Courts-Martial,” September 5, 1984, has not been used in inspections for years;
- JAG/CNLSCINST 5814.1, “Post-Trial Checklists,” December 2, 1992 (containing extensive post-trial checklists) also has not been used in inspections for a long time and is being replaced with draft JAGINST 5040.1D, “Uniform Code of Military Justice Article 6 Legal Office Assessment,” which is now used in the field;
- COMNAVLEGSVCCOMINST 5040.1C, “Command Inspections,” January 30, 2001, Enclosure (3), “Command Inspection Checklist,” is the most current inspection checklist published, but predates the reorganization creating the Region Legal Service Offices and is not currently used in inspections.

For the past 3 years, the JAG IG has been using the checklist in draft JAGINST 5040.1D, which accounts for the Region Legal Service Office structure, but is not a final policy.<sup>31</sup>

The Vice Commander, Naval Legal Service Command, told us the JAG IG sends out the draft checklist in advance so the unit can complete a self-assessment and return the information before the inspection. The JAG IG then travels to the unit and completes the inspection, which focuses on leadership and other areas, such as retention, recruiting, training, fitness, and facilities. Surveys are also completed. The military justice portion primarily entails interviewing various officials involved in military justice administration, investigation and execution (e.g., command leaders, trial counsel, command services personnel) to examine working relationships, which consumes about 40-50 percent of the inspection time (4-7 days). Navy JAG or Deputy JAG Article 6 visits often follow these “nuts and bolts” inspection.

Generally, the JAG IG is not given any court-martial case numbers or metrics before or during the inspections, and does not examine Region Legal Service Office records, case files,

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<sup>31</sup> The instruction was published in final form on June 14, 2010, as we were completing this report.

documentation, or processing standards/timelines during the inspections. Prior to the changed philosophy for inspections, the JAG IG team examined files and records, and the military justice examination was more detailed.

The Navy JAG has not addressed post-trial processing problems specifically with the JAG IG, and the matter has not been a Navy JAG “special interest item” in the inspection program. Accordingly, since the headquarters’ decision in 2006, inspections have not addressed military justice administration in detail, because the current Navy JAG believed the limited field inspections, together with Article 6 inspections and on-going reporting to the Commander, Naval Legal Service Command, would be sufficient for headquarters monitoring. In a recent meeting, however, the Navy JAG advised us he was re-initiating detailed field inspections because the CMTIS oversight envisioned in his 2006 decision did not materialize.

Navy field offices (Region Legal Service Offices, Naval Legal Service Offices, staff judge advocate offices) continue not having standard systems or processes. The JAG IG opined that staff turnovers caused good systems and processes to get lost and not carry over to incoming people and administrations.

The JAG IG has reported complaints about CMTIS being slow, having bad connectivity, requiring frequent screen “switching,” lacking “user friendliness,” and being unable to generate readily the type reports needed in the field. Field Commands have raised specific system complaints and recommendations to headquarters, and several working groups including both field and headquarters personnel have worked on CMTIS.

We requested JAG IG inspection findings/reports from prior years (1990, 1995, 2000), but they were no longer available. Two inspection reports, one from 2001 and another from 2004 were located. The inspection summary in the 2004 report included one comment relevant to post-trial processing delays. This comment noted a significant case backlog discovered in the prior inspection had been eliminated.

## ***(2) Marine Corps***

Prior to the current year, there was no formal inspection program for Marine Corps field legal activities. Field unit supervisors were solely responsible for ensuring proper and timely military justice administration. Article 6 inspections, which the Marine Corps SJA conducts on behalf of the Navy JAG, were the only higher headquarters opportunities to review and evaluate field operations. These visits were not inspections, per se, but offered insight into staffing, facility and operations matters that local personnel briefed to their staff judge advocates.

In late 2009 and early 2010, the Deputy Staff Judge Advocate to the Commandant of the Marine Corps (then pending confirmation as the Marine Corps SJA, and now the Marine Corps SJA) developed a comprehensive inspection checklist for field units, which he furnished to the Marine Corps Inspector General for use in field inspections. In addition, with the new CMS fielded in February 2010, the Marine Corps SJA now has visibility over case processing in the field, and headquarters can now monitor field performance and timeliness in post-trial processing.

### **m. Authorized Staffing**

#### ***(1) Navy Judge Advocate General Corps***

From 1990 to present, the number of judge advocates authorized in the Judge Advocate General Corps remained at approximately 1 percent of overall Navy end-strength. The actual numbers, however, declined from 922 in 1990, to between 789 and 810 in 2009, including about 441 Reserve judge advocates. General reductions in the post 1990-1991 period accounted for most of the decline in judge advocates between 1990 and 2009.

The reductions occurred despite a dramatic increase in operational law practice and increased demand for deployments and individual augmentee missions. The operational demands and significant deployment obligations impacted military justice significantly. One-third of Judge Advocate General Corps personnel (officer, enlisted, and civilian) are in the Region Legal Service Offices and Navy Legal Service Offices. Navy draws heavily from these offices to fill deployment and individual augmentee requirements.

The resulting impact on military justice is the reduced time legalmen and judge advocates remain on station performing military justice duties. In the past, a lieutenant generally spent 24-36 months on station. In recent years, when absences due to individual augmentee duties are taken into account, the time on station has declined to 18-24 months on average. And, the average may be closer to 6-12 months at home bases in the continental United States.

Currently, a new first-tour lieutenant generally spends the first 6-12 months at a Region Legal Service Office/Navy Legal Service Office before being assigned for individual augmentee duty. There is a 2-month training requirement prior to deployment, and the assignment lasts 6-12 months, often in Iraq, but increasingly in Afghanistan. (The Navy was given responsibility for supporting a National Afghan legal school). As of March 2010, 138 judge advocates were performing individual augmentee duties, primarily supporting Task Force 134 (Detainee Operations in Guantanamo Bay, Cuba), but requirements for detainee operations in Afghanistan and the Office of Military Commissions were increasing.

A 2008 Center for Naval Analyses study affirmed the increased workload. According to the report:

... the status quo situation is marked by personnel working excessive hours (especially officers), work not being done at all times to the level of quality desired ... and a backlog of work developing. Furthermore, the decline in military-justice-related work could reverse itself and trend upward again. This would leave many RLSO and NLSO commands severely undermanned, especially if military justice workload returns to pre-2003 levels. In addition, there are currently about 70 JAG IAs in Iraq, Guantanamo Bay, at sea and in Afghanistan. Should another conflict arise, JAG would be hard pressed to come up with more IAs to field.

In assessing the costs and risks of the "status quo," the report noted "modest to significant stress" evident in the Region Legal Service Office commands, and a developing work backlog, which also impacted work quality. The risk was assessed as "especially acute" in operational or joint

field commands. Their very long work weeks indicated a need for sizable staffing increases to manage the expected workload. The report summarized the “status quo” manpower standard as representing a “great deal of risk to the Navy,” and if selected as the manpower standard, the Navy Judge Advocate General Corps would be “undermanned.” The Marine Corps was not included in this study.

## **(2) Marine Corps Judge Advocates**

Current Marine Corps strength is approximately 204,000 Marines, including 390 to 440 judge advocates at any given time. Judge advocate authorized strength has remained fairly static for the last 20 years, while actual judge advocate numbers fluctuated from a 450 high in 1990 to a 360 low in 1999. In 2010, the number is 469,<sup>32</sup> up from 407 and 409 in 2008 and 2009, respectively. Judge advocate authorizations were 393 for FY 2008, increased to 411 and 432 for FYs 2009 and 2010, respectively, and are projected at 448 and 460 for FYs 2011 and 2012, respectively.

Deployment and individual augmentee duties also have been a significant resource strain, and the demand for non-traditional positions has been growing. Individual augmentee duties were not factors when Marine Corps judge advocates were originally resourced, and involve duties not even existing at the time. Losses to deployment have reduced home station capability to handle the court-martial caseload from each unit, which is in addition to the court-martial caseload remaining when the unit deploys. Some case law decisions listed in Appendix I refer to problems resulting from high deployments leaving military justice units understaffed.

### **n. Standards and Processes**

As described previously, Navy and Marine Corps decentralized operations led to considerable field unit autonomy in managing unit responsibilities. There are relatively few Service-directed standards or processes beyond the guidance in the Uniform Code of Military Justice and the Manual for Courts-Martial.

The extensive processing goals and checklists in JAGINST 5810.1, “Management Goals for Processing Navy Courts-Martial,” September 15, 1984, and JAG/CNLSCINST 5814.1, “Post-Trial Checklists,” December 2, 1992, have not been used in years, and management time goals have been rescinded without replacement, leaving the *Moreno* timelines as the only processing times currently under scrutiny. Field units monitor pre-trial speedy trial requirements, when pre-trial restraint is an issue.

In both current and prior organizational structures, processes have not been uniform or standard across the field elements. Process effectiveness depends on the administrative skill and experience of individual supervisors charged with the various justice processes. Most importantly, a particular unit's effectiveness in military justice administration depends heavily on the initiative and supervision exercised by the individual unit commander, staff judge advocate, and director/officer-in-charge. CMTIS does not afford needed visibility over internal unit processes, necessitating various individualized unit tracking mechanisms developed locally, which depend on the computer skills of assigned personnel.

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<sup>32</sup> Includes 38 judge advocates that graduated from the Naval Justice School on October 8, 2010.

### **o. Senior Official Perspectives**

In our initial meeting with the Navy JAG, Vice Admiral Houck, he shared his belief that the Navy Judge Advocate General Corps drifted away from its military justice roots in the late 1980s/early 1990s, particularly after the first Gulf war. Operational and international law assignments became the more sought after duty and focus.

He affirmed that leadership must be much more engaged in detailing the right people with the right training, in sufficient numbers, and armed with good processes and data tracking capability. He also acknowledged his organization's significant problems in developing a truly useful and adequate automated case management system. He indicated the Marine Corp's new CMS might ultimately be the better system for case tracking, but observed it was too early to assess the system's full utility.<sup>33</sup>

The Navy CMTIS was originally developed as a workload management and measurement tool, not a case tracking tool; therefore, it has several shortcomings. Among the difficulties encountered was funding necessary system upgrades. Vice Admiral Houck cancelled this year's Navy-wide Judge Advocate General's conference to fund new system modifications.

In another interview, a Navy officer characterized the leadership culture in the Navy as one of "control by negation." This phrase refers to the traditional way in which senior commanders manage the historically autonomous, globally-dispersed Navy operations in which a ship's captain is authorized to act with virtually unchecked independence. This independence permeates the Service's operating culture and explains, in some measure, how the post-trial delay problems evolved.

According to the Navy JAG, three other factors impacted post-trial processing: inadequate staffing; a command focus on getting to court/sentence, not on post-trial events; and inadequate visibility over field case management. Absent an ability to "see" how field units were doing, field commanding officers were relied upon to run their organizations in an effective manner without higher headquarters oversight.

A retired Navy judge advocate and former appellate judge on the Court commented that, when working as a staff judge advocate beginning in 1975, he did not have delay problems because he made military justice his first priority; however, the Navy's many special court-martial convening authorities (around 2000 at the time, most on ships moving around the world) made tracking cases and issues difficult. He commented it could be "quite" difficult to "track down" a convening authority when most commanded ships, did not have staff judge advocates assigned, and might have only a legalman, or additional duty yeoman with collateral justice duties to assist in exercising military justice responsibilities.

As an appellate defense counsel, he recalled seeing charge sheets riddled with error because non-lawyers and enlisted members without legal training often drafted the documents. He also recalled serving as Legal Counsel to the Chief of Naval Personnel in the late 1990s, when the

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<sup>33</sup> In our final meeting with him before preparing this report, Admiral Houck indicated he is awaiting benchmarking results and recommendations from the ongoing Center for Naval Analyses study, but does not now believe the Marine Corps CMS would be a good replacement for CMTIS.

convictions in a series of courts-martial were set aside because the records had been “lost.” Among the consequences, every affected Service member was due back pay, for years in some cases. The Navy personnel command had to find millions of dollars to cover the payments.

One early recollection from his time as both an appellate defense counsel and appellate judge involved the policy allowing lieutenant assignments to appellate government and defense counsel positions as their first duty assignments upon completing basic Naval Justice School training. The assignments were not good for these junior judge advocates who had neither tried cases nor matured as officers.

Major General Ary, the Marine Corps SJA, remarked that Marine Corps judge advocates had also drifted from the core military justice function because the “fast track” to good jobs and promotions had, over the years, shifted to duty in operational billets. This shift led to an environment of inattention and decline in processing performance, which led to long delays. Additionally, the sheer military justice case volume and decentralized organizational structure contributed to post-trial problems.

Major General Ary pointed out demands on the Marine Corps to assume more traditional Army-land roles in the Iraq conflict dramatically increased the demand for judge advocate services in operational billets. Frequent deployments and numerous individual augmentee requirements reduced staffing at ashore legal centers. Captains, who comprise the bulk of military justice judge advocates in the Marine Corps, experienced reduced litigation opportunities, leading to a growing experience gap. Traditionally, first assignment captains spent 2-3 years learning their basic trade, but this time has been cut nearly in half for some judge advocates due to deployment demands.

Additionally, Marine judge advocates have experienced a grade compression impact from the promotion process. In 1991, the average time for a Marine to become a major was 12 years and 4 months. In FY 2000 and FY2001, this time was 9 years and 7 months. In FY 2011, the time will be 10 years and 9 months. The reduced time in rank narrows the junior officers’ experience base needed to move into a mid-level leadership position.

Given the demands for battlefield deployments, the best judge advocates are generally deployed to the battlefield. Additionally, the judge advocate community has been tasked with providing judge advocates for command support in lower echelon organizations without judge advocate positions in their historical organizational structures, e.g., the Marine Corps is now embedding judge advocates in battalions and regiments.

The post-trial process lacked the interest shown in the pre-trial process, and the primary “push” in the pre-trial process was to “get to sentence” on an accused. The Marine Corps SJA commented that, organizationally, the Marine Corps had always operated with a trust attitude, trusting people were doing their jobs. Since assuming the present position, the Marine Corps SJA has undertaken several initiatives to improve and monitor performance, thereby shifting to a “trust but verify” approach.

We discussed Marine Corps organizational structures in the field, primarily at the Legal Service Support Sections and Law Centers visited. The Marine Corps has three Legal Service Support Sections, one for each Marine Expeditionary Force. They provide military justice and administrative law services to the command, and their justice operations are organized into separate trial shops, court reporter shops, and review shops.

This separation increases the opportunity for pre- and post-trial delays because no single system tracks case movement through the field process. Without a common operating system for staff judge advocates, review officers, and officers-in-charge to monitor, oversight was as much or little as local supervisors and officers-in-charge chose to exercise. Existing tracking system/mechanisms were completely internal to the individual shops. Prior to the Marine Corps CMS fielding in February 2010, no central tracking system/mechanism existed to capture case activity in the Marine Corps, or across individual field organizations.

Another senior Marine official told us military justice was a chief focus for Marine Corps attorneys before September 11, 2001, and many joined the Marine Corps to litigate criminal cases. Due to the high caseload and litigation opportunities, Marine Corps judge advocates excelled as litigators. The same was true with Navy judge advocates. In trial and defense counsel roles, Marine Corps judge advocates interacted with Marine Corps commanders on military justice issues. Expertise in operational law was, prior to September 11, not considered a core competency. That situation changed.

Operational law and international law assumed greater roles in the Marine Corps judge advocate community as the Marine Corps became involved in two wars and judge advocates were assigned down to the battalion level in war zones. In contrast, the military justice caseload declined and with that decline, trial advocacy and military justice competency suffered.



## Appendix L. Other Initiatives

Other Navy Initiatives.<sup>34</sup>

- May 23, 2007: The Navy JAG sent a memorandum to all staff judge advocates in the Navy addressing post-trial errors and advising that this area would be included as an Article 6 inspection item; he requested that the Chief Judge of the Navy-Marine Corps Court of Criminal Appeals include staff judge advocate names in court opinion “headnotes,” which is now being done.
- 2007-2008: The Navy JAG selected an O-6 (Captain) military justice “Expert” as Director of the Criminal Law Division (Code 20), hired two experienced civilian litigators to assist with complex and capital cases, and re-established “Newsmailers” (current topic informational bulletins).
- 2008: The Navy JAG imposed a limitation on detailing appellate government and defense counsel to individual augmentee duty.
- 2009: A “Case Evaluation Project” was completed that assessed deficiencies in litigation training and performance, with emphasis on sexual assault cases and specific curriculum recommendations to the Naval Justice School.
- 2009: the “detailing cycle” focused on filling military justice litigation career track billets, increasing the fill rate from 40 percent to 57 percent.
- 2009: Navy Judge Advocate General Reserve program was reorganized into three “pillars of support expertise” in the Reserve Component Judge Advocate Total Force Structure (JAGINST 1001)—the objective was to assign Reserve officers with significant military justice or civilian criminal justice experience to positions supporting military justice.
- 2009: the Defense Counsel Assistance Program (DCAP) was adopted as a priority action item for 2010.
- 2009: JAGINST 1150.2A requires filling specific billets with military justice specialists or experts—the requirement applies to four judges on the Court, including the Chief Judge.
- 2009: the Military Justice Oversight Council (MJOC) was established. The Judge Advocate General of the Navy chairs the council, which is a general/flag officer forum for reviewing military justice in the Navy and Marine Corps. The council has been meeting monthly to review structural, resourcing and other matters that affect delivering timely and effective military justice services and evaluate case progress. A SECNAV instruction formalizing the council is in development.
- 2009: The Judge Advocate General of the Navy approved reporting “triggers” for briefing military justice cases to the Military Justice Oversight Council. The triggers include: cases at 75 days without convening authority action; cases not docketed with the Court after 150 days (the Marine Corps monitors CMS to identify its cases falling in the 75 day and 150 day parameters); cases docketed with the Court longer than a year; cases in panel longer than 6 months (if the appellant is confined); and any case in its 5th time extension. These triggers are documented in Council meeting minutes.

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<sup>34</sup> In commenting on the draft report, the Navy JAG submitted a list categorizing and expanding upon his overall initiatives to improve the military justice system. The list is included in Section VII, pages 102 - 106.

- 2009: NAMARA Code 40 procedures were modified to include comprehensive court “mandate” case tracking in an Excel spreadsheet; field staff judge advocates are given this tracker, plus a list showing the records of trial Code 40 received in the previous month, to help assure record control.
- 2009: trial and appellate judges were given formal guidance on *DuBay* hearings.
- 2010: The Navy JAG commissioned a new military judge “survey of counsel” scheduled for completion in July 2010.
- 2010: Developing a Navy and Marine Corps case tracking system was adopted as a JAG 2010 priority action item.
- 2010: Drafted a SECNAV instruction (still in review) requiring an annual report on the state of military justice to the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps.
- March-June 2010: After the *Bartolo* case surfaced, the Navy JAG directed an exhaustive audit of all relevant Navy and Marine Corps records to identify and locate any case due for appellate review that might be unaccounted for or missing. That review has been completed and there is high confidence every appellant case was accounted for.
- June 2010: Effective July 1, 2010, the Navy JAG intends to establish the Defense Counsel Assistance Office under the leadership of a captain, a Military Justice Career Track-designated officer, in the Judge Advocate General Corps who will report to the Commander, Naval Legal Service Command. At the same time, he intends to formally establish a Trial Counsel Assistance Office under the tactical control of the Assistant Judge Advocate General (Operations and Management). In addition, he will continue evaluating the feasibility of establishing a separate defense command.
- June 2010: The Judge Advocate General of the Navy directed all JAG IG inspections of Region Legal Service Offices and fleet units would include an officer or civilian with military justice expertise. Scheduling to ensure subject matter expertise in both military justice and legal assistance missions for inspections at Naval Legal Service Offices are also in development. The Judge Advocate General directed the JAG IG to hire a full-time staff assistant to support the office's administrative duties and certain investigative functions, enabling the JAG IG to focus on the critical substantive aspects of his job. Vice Admiral Houck is also working with Major General Ary to establish a common set of Article 6 military justice inspections items across the Navy and Marine Corps. This initiative will include soliciting stakeholder input and examining best practices.
- June 2010: A new instruction will be developed outlining detailing policy for military justice assignments, such as judicial tour lengths, requirements for attending and passing the Military Judge's course, a requirement for staffing NAMARA with at least second-tour officers, and assigning Reserve Component officers to military justice, including direct assignments to Appellate Defense Division (Code 45) and Appellate Government Division (Code 46).
- June - September 2010: The Navy JAG will oversee a zero-based review of military justice policy and execution directives in the Department of the Navy to ensure current practices are institutionalized and practitioners have ready references for guiding their practice and ensuring compliance with relevant requirements. Instructions will be reviewed and re-issued to coincide with the next annual update cycle for the Manual of the Judge Advocate General (JAGMAN), which begins October 1, 2010. Additionally, prospective commanding officers and

executive officers will be familiarized with the range of military justice instructions and requirements at an annual course.

#### Other Marine Corps Initiatives:

- 2009: Work began to identify inefficiencies in court-martial administration.
- January 9, 2010: The Deputy Staff Judge Advocate sent a memorandum to all Marine Corps judge advocates discussing standards for court-martial post-trial processing, outlining problem areas, reiterating the *Moreno* standards, and advising them to focus on three specific areas: the Case Management System, standardization, and inspections.
- February 2010: Fielded the upgraded Case Management System (CMS).
- 2010: Increasing the Information Technology section to four people--civilian chief with two enlisted members and one civilian employee.
- 2010: Training Marine field legal offices on CMS use and operations. (The training had been completed at the two Legal Service Support Sections that we visited.)
- 2010: Expanding CMS to include administrative separation actions.
- 2010: Created the Marine Corps-specific Trial Counsel Assistance Program under which a litigation expert at Marine Corps headquarters (currently, a field-grade officer) can answer questions from and advise trial counsel in the field. The program will include a GS-15 Sexual Assault and Complex Litigation Expert position, and the Staff Judge Advocate to the Commandant is considering a program expansion to have three field-grade trial counsel with proven military justice expertise at the regional level for consultation with local trial counsel. The program currently has military justice information for trial counsel throughout the Marine Corps, via web site, share point, blogs, and practice advisories.
- 2010: Plan to standardize and develop more common processes and methodologies--recent decision that all court reporters will work for and report to the Review shops to stop previous inconsistency under which reporters worked for either the Trial Section, Review Section, or military justice officer.
- 2010: Considering a proposal to standardize and develop a common curriculum for Marine members at the Naval Justice School that includes initial CMS training, rather than have Marine members learn CMS on the job after arriving at an installation.
- 2010: Strengthened focus and inquiry areas for Article 6 visits-- pursuant to authority in Article 6(a), UCMJ, and SECNAVINST 5430.27C, the Staff Judge Advocate to the Commandant visits all Marine Corps installations to assess the legal services provided. Since there was no standard inspection process, the current Staff Judge Advocate to the Commandant developed uniform information requirements for use in these visits.
- 2010: A new Legal Services Training and Readiness Manual was developed (signed May 13, 2010) establishing Core Capability Mission Essential Tasks for readiness reporting, and requiring standardized training for Marines assigned to Marine Corps legal services organizations. The manual includes formal taskings for schools that prepare personnel for service in the Marine Corps Legal Services Occupational field. After entry level training, the manual will be used periodically to evaluate a Marine's proficiency in the tasks required for the 44XX military occupational specialty.
- 2010: Standardized Forms/Hot Docs 2009. In conjunction with implementing the CMS, the Staff Judge Advocate to the Commandant began a process to capture and consolidate

forms, document templates, checklists and standard operating procedures, with a view toward standardization where appropriate. In April 2010, fleet testing began on “Hot Docs 2009” software, including all the forms and templates created, at legal offices throughout the Marine Corps. The testing is expected to last 4 to 6 months.

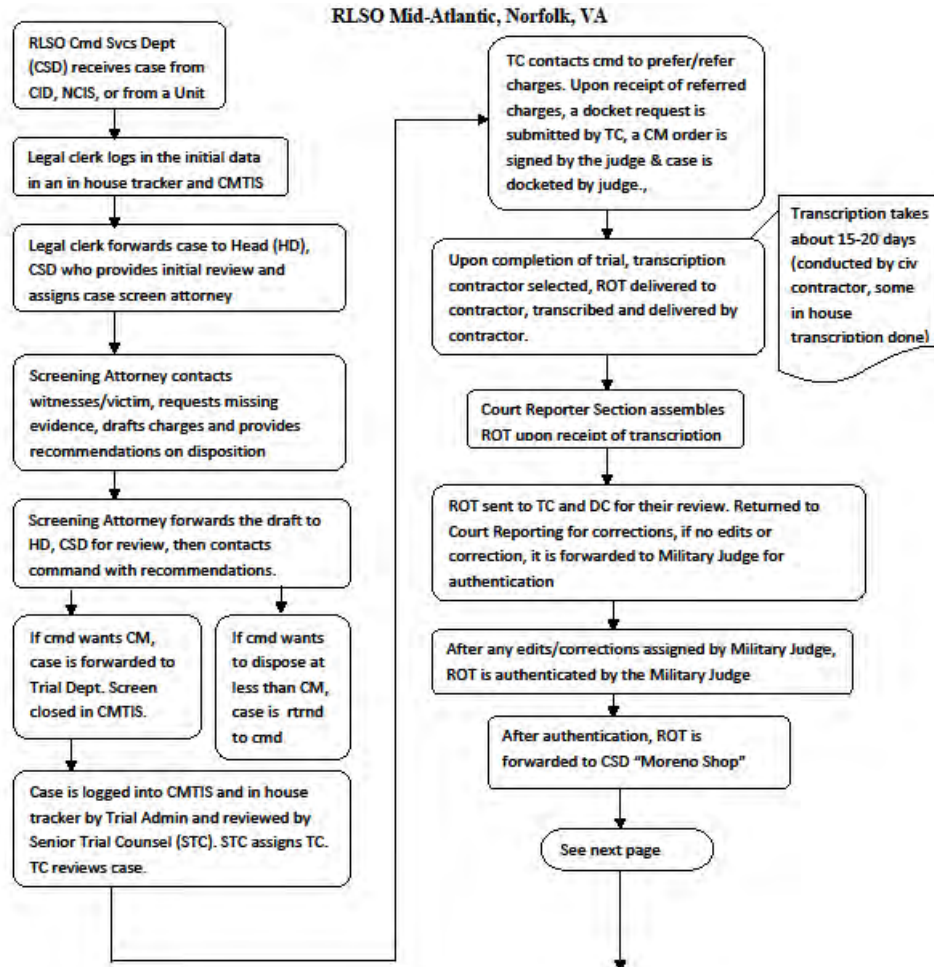
- May 25, 2010: Reserve Legal Services Support Section -- Based on a 2010 Marine Corps SJA initiative, in FY 2011, the Marine Reserve’s Legal Services Support Section, which is currently part of the Marine Corps Mobilization Command, will formally transfer to the Staff Judge Advocate to the Commandant. The change will give the Marine Corps SJA operational sponsorship and management over Marine Reserve judge advocates that reside in the Reserve Legal Services Support Section, and further enhance integrating Reserve judge advocates into the total force, which is critical in light of operational demands.

- 2010: Electronic Record of Trial. The Marine Corps judge advocate community and the Appellate Government Division (Code 46) began a pilot project at Camp Pendleton to test transmitting and using electronic records of trial. The project is ongoing. The first electronic record of trial transmission to NAMARA has occurred, and business rules to govern the process are in development.

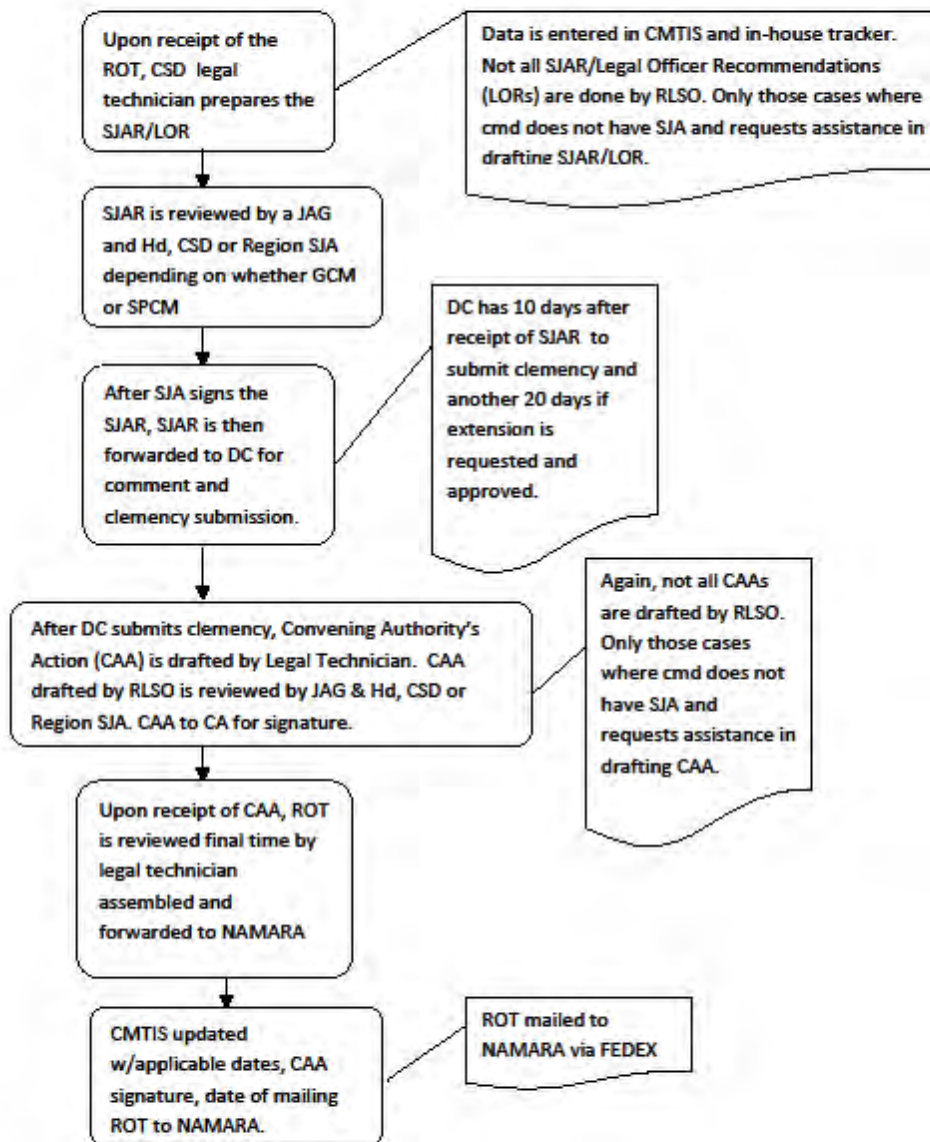
- Regionalize Post-Trial Processing. The Marine Corps judge advocate community is examining possibilities for streamlining review office structures throughout the Marine Corps. The intent would be to merge existing offices at a regional level to reduce moving parts, consolidate resources and expertise and, thereby, gain efficiencies and accuracy.

## Appendix M. Field Office Process Flow Charts

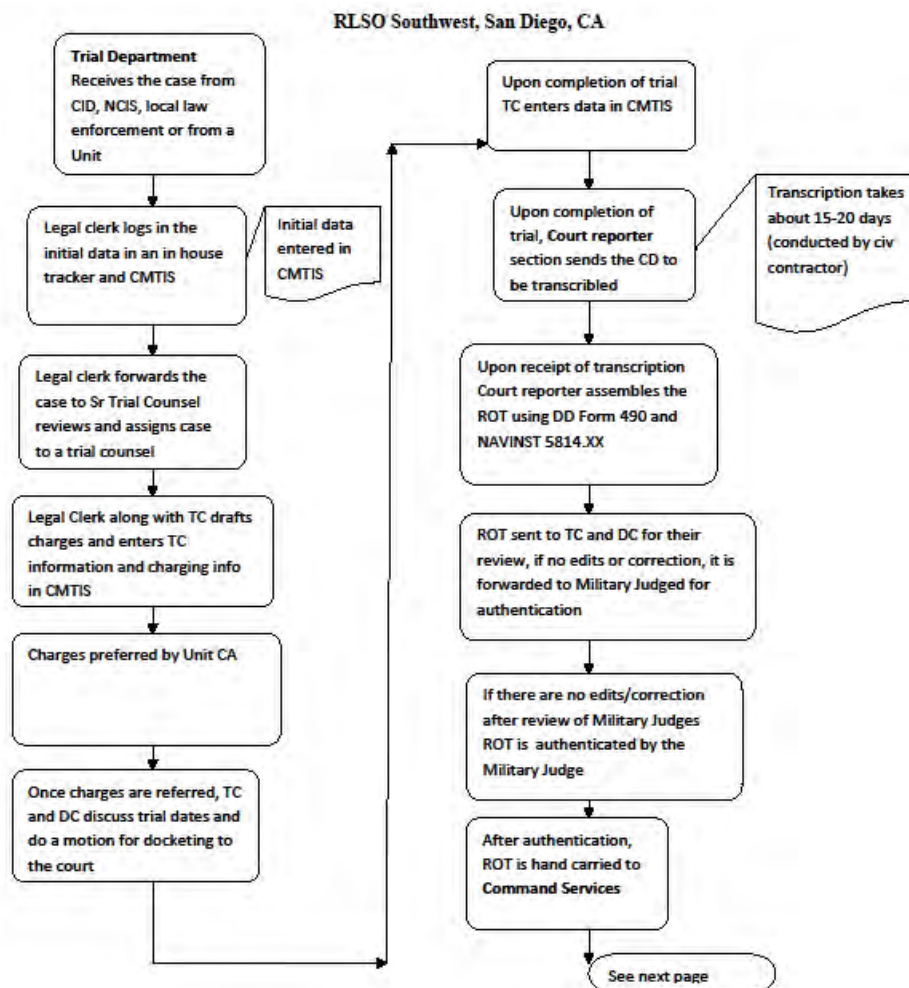
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RLSO MidAtlantic, Norfolk, VA (continued)

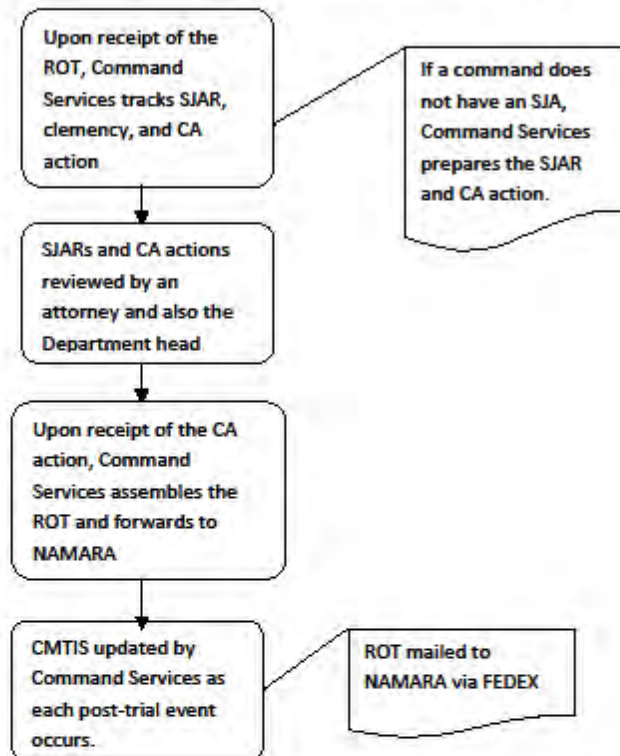


## Navy RLSO Southwest, San Diego, CA



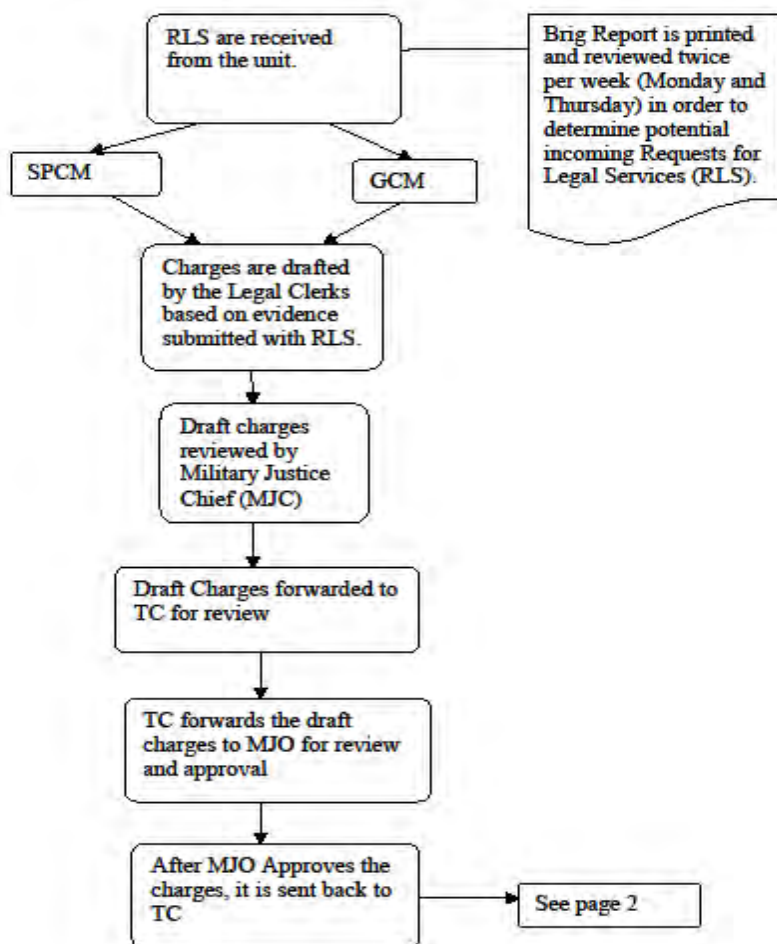


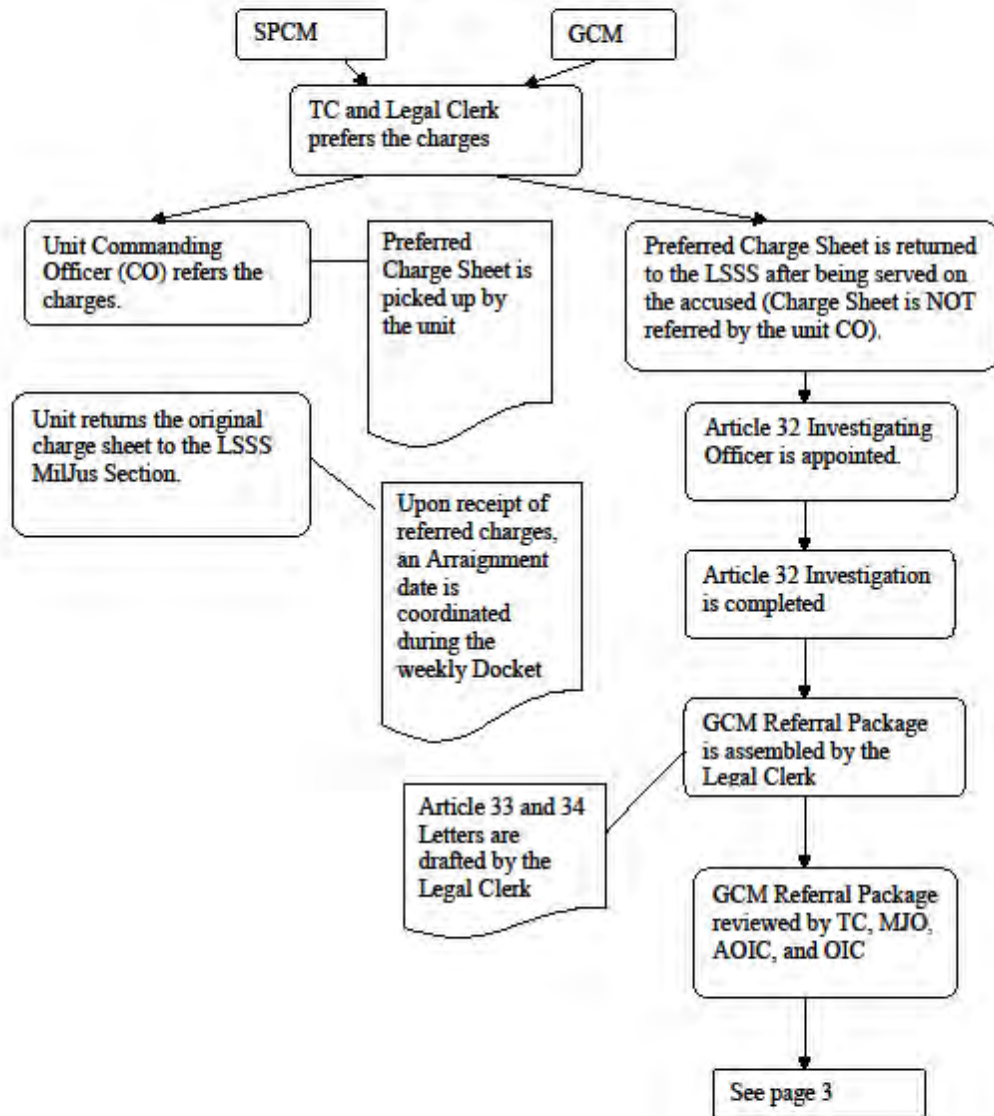
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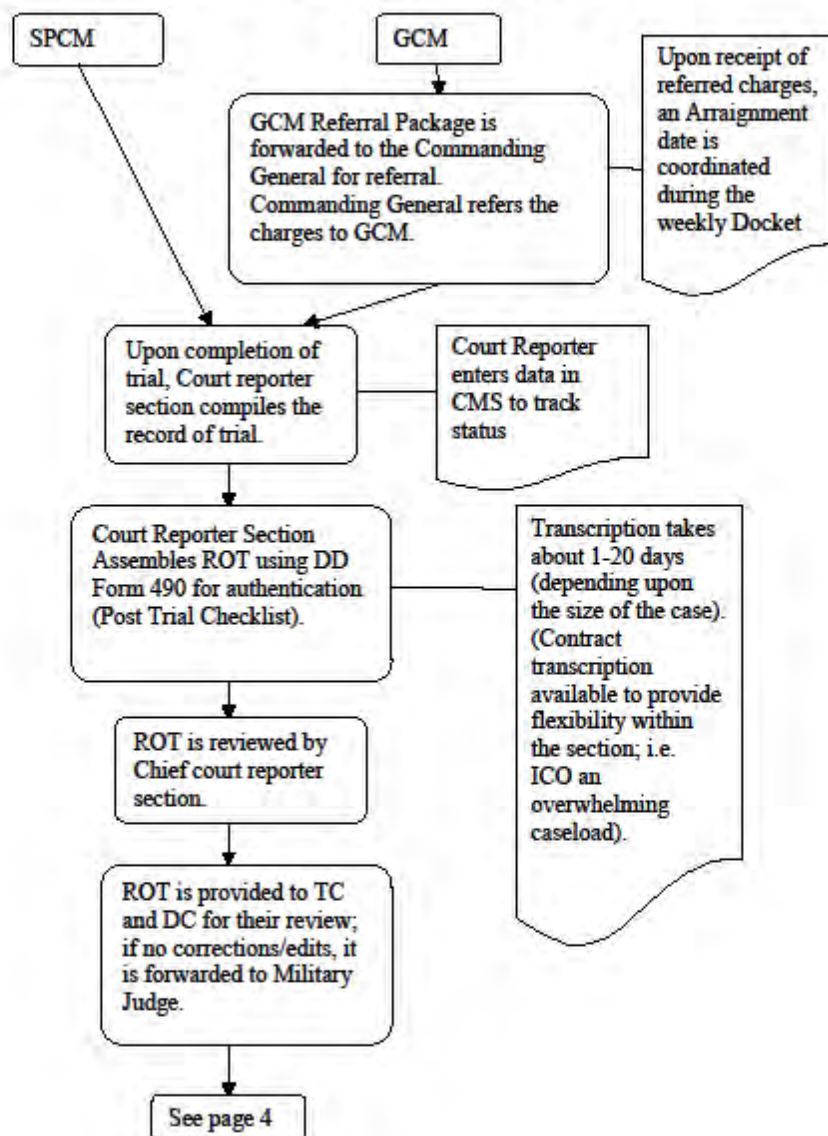
## Marine Corps LSSS Camp Lejeune, NC

### 2nd MLG, LSSS, Camp Lejeune, NC Processes

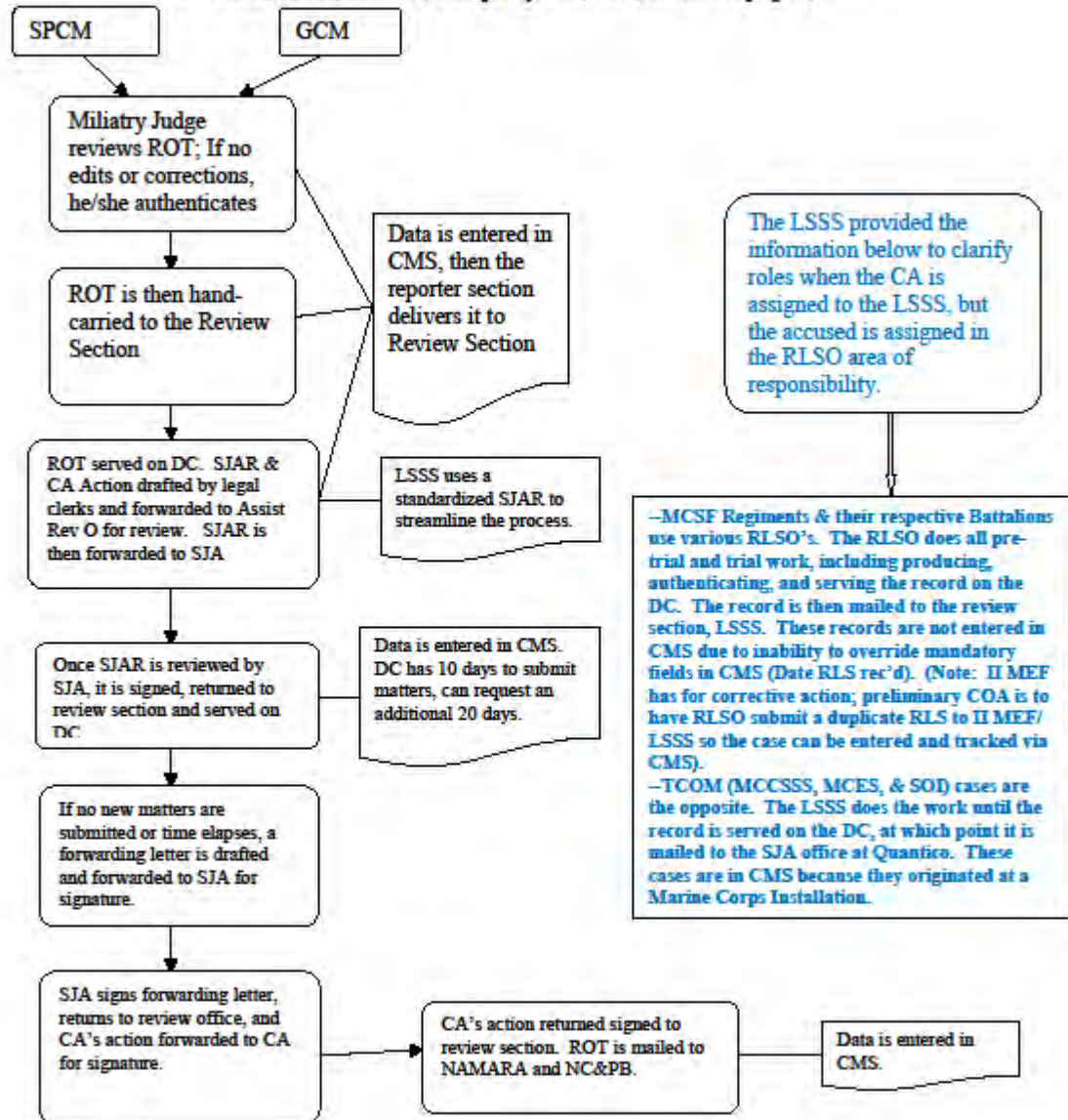




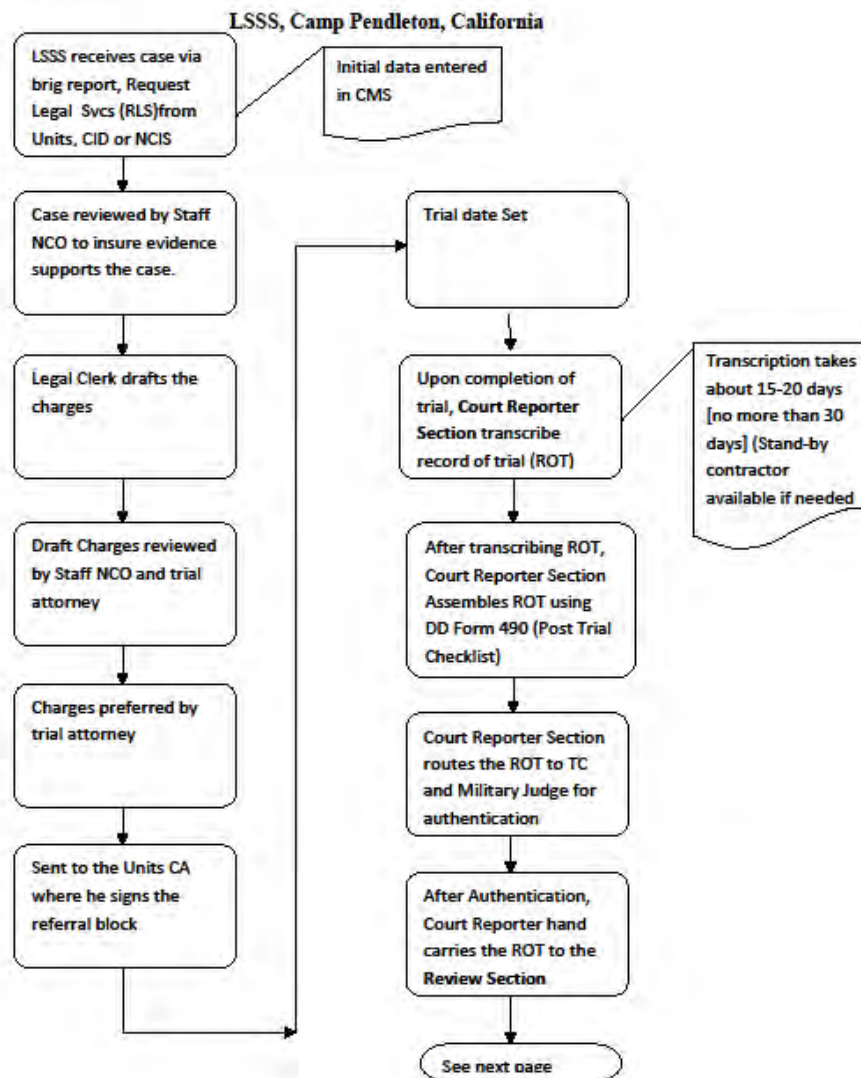
2<sup>nd</sup> MLG, LSSS, Process, Camp Lejeune, NC (continued page 3)



2<sup>nd</sup> MLG, LSSS, Process, Camp Lejeune, NC (continued page 4)

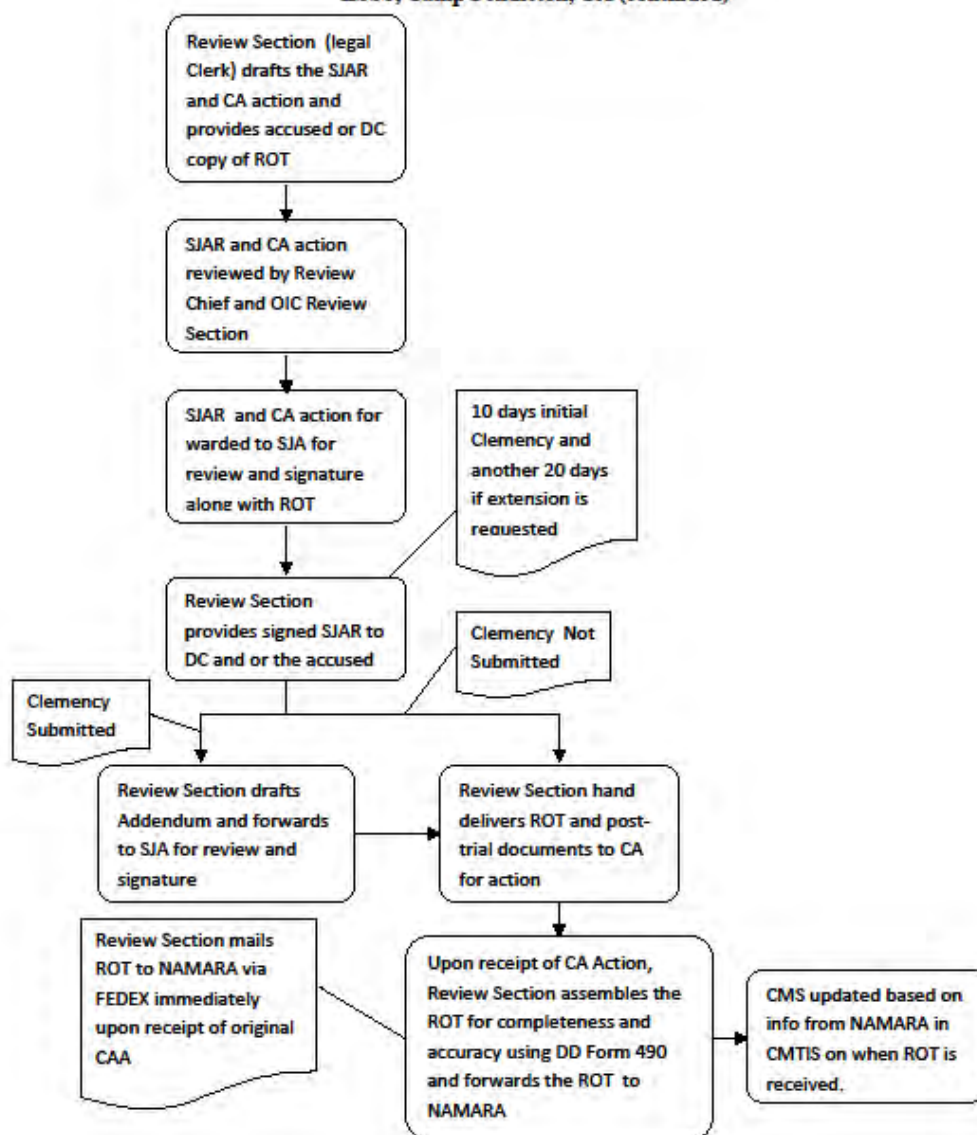


## Marine Corps LSSS Camp Pendleton, CA





LSSS, Camp Pendleton, CA (continued)





## **Appendix N. Case Management/Electronic Case Filing (CM/ECF) System**

The CM/ECF measures time and “date stamps” all documents received in the system. Attorneys enter data while working in the system. All case documents are loaded in the system, affording immediate access to any party needing access. The system can calculate the time elapsed between events, for a single case, or for multiple cases. Everything generating a data entry is time measurable.

All documents associated with the case are part of the official record of trial, which is located in CM/ECF and available real-time as filings are completed and judges enter rulings. The system’s automatic service and notice function records when (date and time) a pleading is filed and electronically notifies all parties to the litigation. This function allows the responsible judge to issue an order directly in the system, and the responsible counsel to receive immediate notification the order was issued.

Everything associated with a trial (cradle-to-grave) is uploaded, recorded, transmitted, and stored electronically in the system. The case “view” is a “docket sheet” showing each step in the trial to date, making case status determinations easy without searches or having to view multiple screens.

The CM/ECF can be programmed to include standard forms for pre-trial, trial, and post-trial events. This capability includes standard forms for staff judge advocate recommendations (SJAR) and convening authority actions, which the responsibly party can complete in the system.

The system can also be programmed to aggregate case data and generate desired reports, such as a report on all sexual assault cases tried in a given period, or a report on cases exceeding post-trial processing goals. In addition, the system can be programmed to generate automatic reminders/warnings when actions on pending cases exceed processing time goals. For example, the Administrative Office, Federal Courts, uses a warning feature to alert the judge when a motion becomes 90 days old and has not been acted upon.

Other system features include:

- user name and password acts as digital signature on documents;
- 24-hour access to case file documents over the internet;
- ability to file pleadings electronically with the court;
- documents are automatically time stamped and marked as filed, from pretrial through appeal(s);
- automatic email notification when case activity occurs;
- ability to download and print documents directly from the court system;
- concurrent, multiple party access to case files;
- savings in time and expenditures for attorneys;
- expanded search and reporting capabilities; and

- easy to use -- based on standard internet browser.

System benefits include:

- attorneys nationwide have used successfully;
- no delays or added expenses associated with mail or courier services;
- speeds delivery and allows easier case activity tracking;
- reduces physical storage space needs and document processing times;
- uses standard internet software and established "PDF" format;
- is secure and reliable;
- court dockets are immediately updated and available;
- compiles documents electronically for appellate review;
- centralizes storage for all military justice pleadings;
- reduces needless document duplication;
- efficiently tracks aging cases;
- ensures that records of trial are not lost;
- provides appellate court with detailed summary, docket entries and case history;
- allows all case parties (including original trial and defense counsels) to track case

from beginning to end;

- data can be used in custom reports;
- email notification when all case filings occur;
- electronic filing serves as certificate of service;
- attorney and case file mobility;
- can keep up with cases in and out of the office;
- improved ability to supervise green attorneys;
- ability to search/view pleadings (Service-wide), trial through appeals; and
- filings and docket entries serve as metrics.

Potential difficulties in adapting the system for military use:

- spearheading development (time investment is somewhat unknown);
- working out kinks – Service-specific interoperability requirements;
- little support from the Administrative Office, U.S. Courts – the Veterans Claims

Court needed legislation to obtain the system, but the Administrative Office responded favorably to another Service's interest;

- system management (personnel);
  - Navy Marine Corps Internet/Service-specific admin requirements; and
- could add additional layer to implementation.

## Appendix O. Judge Advocate Promotions - Precept Language

Since FY 2007, the Navy used the following precept language in judge advocate promotion boards for O-4 (lieutenant commander), O-5 (commander) and O-6 (captain) officers. The language proved successful in enhancing promotion rates for military justice practitioners.

Military justice plays a critical role in the maintenance of good order and discipline and accountability in the Navy. Efficient and effective military justice litigation requires experienced, well-trained judge advocate litigators ... In determining which officers are best and fully qualified, you shall favorably consider the Navy's need for senior officers who have been designated as Military Justice Litigation Experts and Specialists, giving equal weight to their contributions in military justice litigation that ordinarily would be given to other members of the JAG Corps community who have followed more traditional career paths.

Unlike the Navy, Marine Corps judge advocates compete for promotion with officers in all career fields and have performed well historically. Marine Corps promotion boards have generally recognized the experience gained in military justice positions.

The Marine Corps uses special precept language to advise promotion boards when a career field experiences a "critical shortage" (below 85 percent). The following special precept language may be used in a promotion board to highlight a shortage in the judge advocate specialty.

Skill guidance: Within this board's charter to select those officers who are 'best and fully qualified,' the board shall give due consideration to the needs of the Marine Corps for officers with particular skills. At this time the needs of the Marine Corps reflect a critical shortage (below 85%) of officers in the grade of ... in the following skill areas:

The table below shows the overall promotion rates for Marine Corps majors, lieutenant colonels, and colonels during recent fiscal years as compared to the rates (both percentage and actual number) for positions in the judge advocate Military Occupational Specialty. As can be seen in the table, major and lieutenant colonel judge advocate promotions generally were better than the overall rates, but colonel judge advocate rates generally were not:

- the promotion rate for major judge advocates was higher than the rate for majors overall in five (80 percent) of the six fiscal years reported;
- the rate for lieutenant colonel judge advocates was higher than the rate for lieutenant colonels overall in every (100 percent) fiscal year reported; and
- the rate for colonel judge advocates was higher than the overall colonel rate in two (33.3 percent) of the six years reported, and were lower in the remaining four years (66.7 percent).

We cannot attribute the differences reported to precept language usage. The rates for majors and lieutenant colonels were higher even though precept language was not used, and generally were lower for colonels even when precept language was used.

Promotion Results  
Marine Judge Advocates Compared to Overall for Rank

FY	Major			Lieutenant Colonel			Colonel			Precept Language Used **
	JA MOS (a)	All MOS (b)	Dif.* (a)-(b)	JA MOS (c)	All MOS (d)	Dif.* (c)-(d)	JA MOS (e)	All MOS (f)	Dif.* (e)-(f)	
<b>2011</b>	87.1% (27 of 31)	82.8%	4.3%	81.8% (18 of 22)	65.6%	16.2%	50.0% (2 of 4)	53.6%	-3.6%	<b>No</b>
<b>2010</b>	90.6% (29 of 32)	87.6%	3.0%	88.9% (16 of 18)	71.8%	17.1%	64.3% (9 of 14)	53.4%	10.9%	<b>Yes</b>
<b>2009</b>	78.4% (29 of 37)	87.0%	-8.6%	90.9% (10 of 11)	70.6%	20.3%	33.3% (4 of 12)	50.5%	-17.2%	<b>Yes</b>
<b>2008</b>	90.0% (18 of 20)	87.2%	2.8%	82.4% (14 of 17)	65.0%	17.4%	12.5% (1 of 8)	51.0%	-38.5%	<b>No</b>
<b>2007</b>	90.0% (27 of 30)	86.5%	3.5%	75.0% (9 of 12)	62.5%	12.5%	23.5% (4 of 17)	48.4%	-24.9%	<b>No</b>
<b>2006</b>	92.9% (26 of 28)	81.7%	11.2%	78.9% (15 of 19)	67.2%	11.7%	80.0% (4 of 5)	50.8%	29.2%	<b>Yes</b>

\* Percentage point difference

\*\* Used in colonel promotion boards only in the fiscal years covered

## **Appendix P. Report Distribution**

Office of the Secretary of Defense  
General Counsel, Department of Defense  
Assistant Secretary of Defense (Legislative Affairs)

Department of the Navy  
Secretary of the Navy\*  
Department of the Navy, Office of the General Counsel  
Judge Advocate General of the Navy\*  
Naval Inspector General  
Staff Judge Advocate to the Commandant, United States Marine Corps\*

Department of the Army  
Judge Advocate General of the Army

Department of the Air Force  
Judge Advocate General of the Air Force

Congressional Committees and Subcommittees, Chairman and Ranking Minority Member  
Senate Subcommittee on Defense, Committee on Appropriations  
Senate Committee on Armed Services  
Senate Committee on Governmental Affairs  
House Subcommittee on Defense, Committee on Appropriations  
House Committee on Armed Services  
House Committee on Government Reform

\*Recipient of draft report





# Inspector General Department of Defense